Docket for 03-1116

(21)

No. 03-1116
Vide 03-1120
Title: Jennifer M. Granholm, Governor of Michigan, et al., Petitioners
v.
Eleanor Heald, et al.
Docketed: February 4, 2004
Lower Ct: United States Court of Appeals for the Sixth Circuit
Case Nos.: (01-2720)
Decision Date: August 28, 2003
Rehearing Denied: November 4, 2003
Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Jan 30 2004	Petition for a writ of certiorari filed. (Response due March 5, 2004)
Feb 26 2004	Brief amici curiae of National Alcohol Beverage Control Association, et al. filed. VIDED
Mar 5 2004	Order extending time to file response to petition to and including April 5, 2004.
Mar 5 2004	Brief amicus curiae of National Beer Wholesalers Association filed. VIDED.
Mar 8 2004	Brief amici curiae of Ohio and 35 Other States filed.
Apr 5 2004	Brief of respondents Eleanor Heald, et al. in opposition filed. VIDED.
Apr 20 2004	DISTRIBUTED for Conference of May 13, 2004.
Apr 30 2004	Reply of petitioners Jennifer Granholm, Governor of Michigan, et al. filed. (Distributed)
May 17 2004	DISTRIBUTED for Conference of May 20, 2004.
May 24 2004	Petition GRANTED limited to the following Question: "Does a State's regulatory scheme that permits in-state wineries directly to ship alcohol to consumers but restricts the ability of out-of-state wineries to do so violate the dormant Commerce Clause in light of Sec. 2 of the 21st Amendment?" This case is consolidated with Nos. 03-1120 and 03-1274 and a total of one hour is allotted for oral argument.
Jun 10 2004	Motion for realignment of the parties and to set a briefing schedule filed by the parties. VIDED
Jun 14 2004	Response to motion for realignment of the parties and to set a briefing schedule filed by Swedenburg, et al.
Jun 14 2004	Response to motion for realignment of the parties and to set a briefing schedule filed by Heald, et al.
Jun 18 2004	Reply in support of motion to realign parties and to set a briefing schedule filed. VIDED
Jun 28 2004	Motion for realignment of the parties and to set a briefing schedule DENIED.
Jun 28 2004	Extension of time within which to file the joint appendix and petitioners' briefs on the merits to and including July 29, 2004.
Jun 28 2004	Extension of time within which to file respondents' briefs on the merits to and including September 23, 2004.
Jul 19 2004	Blanket consent to the filing of all amicus briefs in support of either party received from counsel James Tanford, Thomas Casey and Anthony Kogut in Cases No. 03-1116, 03-1120, and 03-1274.
Jul 26 2004	Brief amici curiae of National Alcohol Beverage Control Association, et al. filed. VIDED.
Jul 29 2004	Joint appendix filed. VIDED.

Jul 29 2004	Brief amicus curiae of National Beer Wholesalers Association filed. VIDED.
Jul 29 2004	Brief amici curiae of Michigan Association of Secondary School Principals, et al. filed. VIDED.
Jul 29 2004	Brief amicus curiae of Illinois Alcoholism and Drug Dependence Association filed. VIDED.
Jul 29 2004	Brief amici curiae of Ohio and 35 Other States filed.
Jul 29 2004	Brief of petitioners Jennifer Granholm, Governor of Michigan, et al. filed.
Jul 29 2004	Brief amici curiae of Wine and Spirits Wholesalers of America, et al. filed. VIDED.
Sep 23 2004	Brief of respondents Eleanor Heald, et al. filed. VIDED.
Sep 23 2004	Brief amicus curiae of DKT Liberty Project filed. VIDED.
Sep 23 2004	Brief amici curiae of American Homeowners Alliance, et al. filed. VIDED.
Sep 23 2004	Brief amicus curiae of Wine Institute filed.
Sep 23 2004	Brief amicus curiae of Members of the United States Congress filed. VIDED.
Sep 23 2004	Brief amici curiae of WineAmerica, et al. filed. VIDED.
Sep 23 2004	Brief amici curiae of George A. Akerlof, et al. filed. VIDED.
Sep 23 2004	Brief amicus curiae of Goldwater Institute filed. VIDED.
Sep 23 2004	Brief amici curiae of California, et al. filed.
Sep 23 2004	Brief amicus curiae of Cargo Airline Association filed. VIDED.
Sep 23 2004	Brief amici curiae of Napa Valley Vintners, et al. filed. VIDED.
Sep 29 2004	SET FOR ARGUMENT ON Tuesday, December 7, 2004.
Oct 1 2004	CIRCULATED.
Oct 7 2004	Motion to reorder presentation of oral argument and for divided argument filed by Granholm, et al., MI Beer and Wine Wholesalers, Swedenburg, et al., and Kelly, et al. VIDED
Oct 18 2004	Response to motion to reorder, etc. from respondents Eleanor Heald, et al. filed. VIDED. (Distributed)
Oct 21 2004	Reply of petitioners Juanita Swedenburg, et al. filed. VIDED. (Distributed)
Oct 28 2004	Reply of petitioners Jennifer Granholm, Governor of Michigan, et al. filed. (Distributed)
Oct 28 2004	Record received from U.S.C.A. 6th Circuit. (1 binder)
Nov 1 2004	Motion to reorder presentation of oral argument and for divided argument GRANTED.
Nov 8 2004	Record received from U.S.D.C. - Eastern Dist. of Michigan. (1 box)
Dec 7-2004	Argued. For petitioners in 03-1274: Clint Bolick, Washington, D.C. For respondents in 03-1116 & 03-1120: Kathleen Sulivan, Palo Alto, Calif. For petitioners in03-1116 & 03-1120: Thomas L. Casey, Solicitor General, Lansing, Mich. For respondents in 03-1274: Caitlin Halligan, Solicitor General, New York, N.Y.

Supreme Court, U.S.
FILED

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No. 03-

In The Supreme Court of the United States

JENNIFER M. GRANHOLM, Governor; et al.,

Petitioners,

and

MICHIGAN BEER AND WINE WHOLESALERS ASSOCIATION,

Respondent,

v.

ELEANOR HEALD, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under state law, the Michigan Liquor Control Commission generally bans out-of-state direct shipment of alcoholic liquor to consumers' doorsteps, but permits in-state licensed wineries to direct ship to consumers, and out-of-state wineries to import through in-state licensed wholesalers. Out-of-state wineries may also petition the State Liquor Control Commission for an order permitting them to ship wine directly to consumers in the State. Any denial of such a request may be appealed through the State court system. Section 2 of the 21st Amendment to the United States Constitution expressly prohibits importation of alcoholic beverages into any state for delivery or use, in violation of the laws of the State. The Court of Appeals declared Michigan's alcoholic liquor importation law facially unconstitutional in violation of the Commerce Clause. The question presented is:

Does Michigan's regulation of the importation of beverage alcohol under the 21st Amendment facially violate the Commerce Clause when it permits in-state licensed wineries to directly ship alcohol to consumers, but requires out-of-state wineries to import its products through licensed in-state wholesalers and to sell its products through licensed retailers or request permission of the Liquor Control Commission to bypass this distribution system and ship directly to consumers?

PARTIES TO THE PROCEEDINGS

Petitioners, Defendants-Appellees below, are State of Michigan officials including the Governor, the Michigan Attorney General, and the Chair of the Liquor Control Commission. The current holders of those offices have been automatically substituted as parties for the former office holders pursuant to Sup. Ct. R. 35.3.

Respondent Michigan Beer and Wine Wholesalers Association intervened as Defendant-Appellee below. Its interests are not adverse to the interests of Petitioners. Petitioners are informed that the Association intends to file a separate Petition for a Writ of Certiorari.

Respondents, Plaintiffs-Appellants below, include Eleanor Heald, Ray Heald, John Arundel, Karen Brown, Richard Brown, Bonnie McMinn, Gregory Stein, Michelle Morlan, William Horwath, Margaret Christina, Robert Christina, Trisha Hopkins, Jim Hopkins and Domaine Alfred, Inc. The thirteen individual Respondents are Michigan residents. Respondent, Domaine Alfred, Inc., is a California winery. These parties will be referred to collectively in the Petition as Respondents.

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The opinion of the Court of Appeals is reported at 342 F.3d 517 (6th Cir. 2003). App. 1a-18a. The opinion of the District Court is unreported as is the judgment and its order denying reconsideration. App. 25a-39a.

JURISDICTION

The Court of Appeals' judgment was entered on August 28, 2003. App. 19a-20a. The court denied rehearing en banc on November 4, 2003. App. 21a-22a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. XXI provides, in pertinent part:

> Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.
>
> Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

The Commerce Clause, U.S. Const. art. 1, § 8, cl. 3, provides, in pertinent part:

> The Congress shall have power . . .
> * * *
> To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;

The pertinent federal statute is the Webb-Kenyon Act, 27 U.S.C. § 122. App. 44a.

The applicable Michigan statutes, and administrative rules, are Const. 1963, art. 4, § 40, Michigan Compiled Laws (MCL) §§ 436.1109; 1111; 1113; 1203; 1537; 1603; 1605; 1607; 1701; 1719; 1801; 1903; 1909; and Michigan Administrative Code Rules 436.1515; 1719. App. 45a-71a.

STATEMENT

The Michigan Constitution provides that "the legislature may by law establish a liquor control commission which, subject to statutory limitations, shall exercise complete control of the alcoholic beverage traffic within this State, including the retail sales thereof." Const. 1963, art. 4, § 40.

Consistent with its powers under U.S. Const. amend. XXI and the Michigan Constitution and statutes, the Michigan Liquor Control Commission, like most states, has adopted a three-tier regulatory system. It requires that consumers purchase and receive alcoholic beverages from licensed in-state retailers (3rd tier); retailers purchase and receive them from licensed wholesalers (2nd tier); and wholesalers purchase and receive them from licensed manufacturers (1st tier).[1] MCL 436.1203(1). App. 49a-52a. A limited exception to the three-tier system exists for licensed in-state wineries. They may operate in all three tiers and directly ship only their wine products to consumers in the State. MCL 436.1113(9). App. 49a. Such in-state wineries are further subject to very strict shipment laws and regulation. MCL 436.1203(1)-(8). App. 49a-52a.

There is no authorized system for licensing the direct shipment of alcoholic beverages from out-of-state wineries.

[1] 1st tier: MCL 436.1109(1), 1607(1), (Manufacturer); 2nd tier: MCL 436.1113(7), Rule 436.1719(5) (Wholesaler); and 3rd tier: MCL 436.1111(5), 1113(9) (Retailer). App. 45a-71a.

Out-of-state wineries must ship through the three-tier system. Alternatively, they may apply to the Liquor Control Commission to direct ship to consumers and bypass the three-tier system by Commission order. MCL 436.1203(1). A final Commission order denying a direct shipment request by an out-of-state unlicensed winery is appealable by right through the State court system. MCL 600.631. Licensees aggrieved of final Commission orders suspending or revoking their licenses only have a right to appeal through the State court system by leave. MCL 436.1903(2).

The policy of the Liquor Control Commission has been to deny requests for orders to bypass the three-tier system.[2] This is because under the three-tier system transactions and obligations of manufacturers, wholesalers and retailers are to be kept separated. MCL 436.1603; 1605; 1607. App. 55a-59a. With limited exceptions, manufacturers of alcohol may not also be wholesalers, nor may wholesalers be retailers. MCL 436.1113(7); 1537. App. 49a, 53a-54a.

The historical basis for the three-tier structure, as recognized by this Court, is to protect against the collusion, price-fixing and monopolization problems that existed before Prohibition. Other reasons for Michigan's three-tier structure include ensuring an orderly distribution and importation system that helps prevent illegal sales to minors and intoxicated persons and collect taxes. MCL 436.1203(1)-(8); 1701; 1801(2).[3] App. 49a-52a, 60a-66a. See *North Dakota v. United*

[2] Respondent Heald applied to the Liquor Control Commission for permission to direct ship out-of-state wine into the State under MCL 436.1203(1) and was denied. He did not appeal that denial to the State courts.

[3] The National Conference of State Liquor Administrators has estimated that these types of interstate sales result in state tax revenue losses of tens of millions of dollars. The states are also concerned that shipments may be made to underage drinkers. Quarterly Bulletin, Volume 2, March 16 to June 15, 2000, ATF Ruling 2000-1.

States, 495 U.S. 423, 432 (1990) (plurality opinion) (Such three-tier systems are "unquestionably legitimate.").

In-state wineries are excepted from the three-tier system because they are few in number, they are limited to selling their own products, and regulatory control over them is feasible for purposes of collecting taxes and assessing sanctions for violations of the liquor law.[4] Unlike out-of-state wineries, Michigan's retail wineries are directly subject to the State's strict regulatory licensing regimen that includes strict liability for sales to minors and intoxicated persons. MCL 436.1801(3). App. 63a-66a.

Respondents filed their lawsuit in the United States District Court for the Eastern District of Michigan alleging civil rights violations under 42 U.S.C. § 1983 and seeking injunctive and declaratory relief. Respondents specifically requested that Michigan's importation laws barring the shipment of wine into the State be declared unconstitutional. See MCL 436.1203; 1909 and Rules 436.1515; 1719(4). App. 49a-71a. The complaint asserted that Michigan's law as it relates to the importation of alcohol facially violated the Commerce Clause since it discriminated between out-of-state and in-state direct shipments of wine.

The District Court addressed Cross-Motions for Summary Judgment filed by the parties. Petitioners submitted evidence[5]

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[4] Over 21,000 wineries are accessible over the Internet, including 3397 nationwide. http://www.wineweb.com/scripts/wineryCount.cfm Michigan has 39 wineries. http://www.michiganwines.com.

[5] The evidence included but was not limited to: affidavits averring to prosecutions for illegal out-of-state direct shipments to minors; surveys showing the problem with underage drinking at State colleges and the widespread use of the Internet for ordering alcohol; and studies submitted by the *Amicus* Michigan Interfaith Council on Alcohol Problems and the *Amicus* State Universities demonstrating the widespread marketing of alcohol to minors.

with their motion showing the difficulty with effective enforcement over out-of-state shippers, including preventing out-of-state direct shipments of alcohol to minors, collecting taxes from such sales and obtaining jurisdiction.

The Petitioners' motion for summary judgment was granted and Respondents' motion was denied in an unpublished District Court Opinion. *Heald v. Engler*, 00-CV-71438, Slip. Op. (E.D. Mich. Sept. 28, 2001). App. 25a-35a. The District Court held that Michigan's direct shipment law was a permissible exercise of State power under the 21st Amendment. (Michigan's law is not "mere economic protectionism" because the State's statutory scheme is designed "to ensure the collection of taxes from out-of-state wine manufacturers and to reduce the risk of alcohol falling into the hands of minors." App. 34a-35a. Respondents' motion for reconsideration was denied by the District Court on November 5, 2001. In denying the motion the District Court held that the 21st Amendment authorizes states to regulate the flow of alcohol within their borders and the three-tier system is a proper exercise of that authority, despite the fact that such a system places a minor burden on interstate commerce. App. 38a-39a.

The District Court's decision was reversed by the United States Court of Appeals for the Sixth Circuit. The Court of Appeals declared Michigan's direct shipment law unconstitutional on its face, concluding that the regulations in question discriminate against out-of-state wineries, in violation of the Commerce Clause, and cannot be justified as advancing the traditional "core concerns" of the 21st Amendment. *Heald v. Engler*, 342 F.3d 517, 525-528 (6th Cir. 2003). App. 14a-18a. The Court of Appeals remanded the case back to the District Court for entry of summary judgment in favor of the Respondents. App. 19a-20a. On November 4, 2003, the Court of Appeals denied Petitioners Motion for Rehearing En Banc. App. 21a-22a. On November 21, 2003 the Court of Appeals

stayed its mandate pending the Petitioner's filing of a certiorari petition with this Court. App. 23a-24a.

REASONS FOR GRANTING THE PETITION

Michigan imposes importation restrictions on direct shipments of alcoholic liquor from out-of-state distributors. The Court of Appeals declared these restrictions facially unconstitutional under the Commerce Clause despite the specific grant of authority of the 21st Amendment giving states the right to regulate the importation and transportation of beverage alcohol.

The Court of Appeals' decision conflicts with the Seventh Circuit's decision in *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000), *cert. denied, sub nom., Bridenbaugh v. Carter*, 532 U.S. 1002 (2001), and with the Eleventh and Fourth Circuits' decisions in *Bainbridge v. Turner*, 311 F.3d 1104 (11th Cir. 2002) and *Beskind v. Easley*, 325 F.3d 506 (4th Cir. 2003). This Court should grant certiorari to resolve the conflict and for the following reasons.

I. There is substantial conflict among the federal circuits in the interpretation of state rights to regulate the importation of alcoholic beverages under the 21st Amendment when the Commerce Clause is raised as a challenge to those rights.

The issue before this Court is of extraordinary importance in resolving conflicting federal law and in preserving a state's right to maintain control over the importation and transportation of alcohol within its borders. Many courts are

currently struggling with this issue, which has drawn considerable media attention and debate.[6]

Section 2 of the 21st Amendment is plain and clear. It provides direct authority to the states to regulate the sale, transportation and importation of alcohol by prohibiting "the transportation or importation into any State, Territory or Possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof . . ." Yet federal courts across the nation are inconsistent and in conflict with the interpretation of this constitutional amendment when it intersects with the Commerce Clause.

The Fourth, Fifth and Sixth Circuits apply no presumption of validity to the state's powers under the 21st Amendment to control the importation of alcohol when it finds facial discrimination with respect to in-state and out-of-state regulation over direct shipments of alcohol. *Beskind*, 325 F.3d at 517; *Dickerson v. Bailey*, 336 F.3d 388, 406-407 (5th Cir. 2003), and *Heald*, 342 F.3d at 524-527. These circuits treat the interstate transportation of alcohol no differently than cheese. In these circuits, if a state authorizes direct shipping of alcohol by in-state licensed wineries but not by unlicensed out-of-state wineries, the Commerce Clause has been held to "trump" the State's 21st Amendment powers. "Strict scrutiny" is applied to the State laws with little or no deference given to those state laws. In order to have the State statute upheld, states in these circuits must demonstrate that no reasonable nondiscriminatory alternatives are available to advance the same legitimate goals. The 21st Amendment is effectively discarded.

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[6] Court cases are pending in 24 states with the debate intensifying over the legality of laws banning direct shipment of alcohol, the Associated Press reported Oct. 22, 2003. http://www.jointogether.org/sa/news/summaries/reader/0,1854,567335,00.html. The issue is currently pending before the Second Circuit Court of Appeals. *Swedenburg v. Kelly*, (2nd Cir. 03-7089).

On the other hand, the Seventh Circuit applies a presumption of validity to the state's right to control the importation of alcohol in such instances. It declared that out-of-state direct shipment bans, with exemptions for in-state direct shipments, is a permissible exercise of a state's 21st Amendment rights. *Bridenbaugh,* 227 F.3d at 851-854.

The Sixth Circuit sought to distinguish *Bridenbaugh* from the circumstances in this case by suggesting that it involved consumers rather than out-of-state wineries and that the Indiana statute appeared different. *Heald,* 342 F.3d at 526-527. However, this case too involves consumer plaintiffs (13 of them) just as in *Bridenbaugh*. The Seventh Circuit in *Bridenbaugh* found that the consumers had standing to challenge the statute and the case similarly pitted the 21st Amendment against the Commerce Clause. Indiana's statute "permits local wineries, but not wineries in the business of selling . . . in another state or country, to ship directly to Indiana consumers." *Bridenbaugh,* 227 F.3d at 851. Michigan, in application of its shipping law, is the same as Indiana. Writing for the Seventh Circuit, Judge Easterbrook recognized that "§ 2 of the twenty-first amendment empowers Indiana to control alcohol in ways that it cannot control cheese" under the Commerce Clause. *Id.* Rejecting the "core purpose" argument adopted by the District Courts and relying on the text and history of the provision, the Seventh Circuit concluded that after the ratification of the 21st Amendment "[n]o longer may the dormant commerce clause be read to protect interstate shipments of liquor from regulation; § 2 speaks directly to these shipments." *Id.* at 853. The Seventh Circuit found no functional or unlawful discrimination. *Bridenbaugh* squarely conflicts with the Fourth, Fifth and Sixth Circuit decisions. *Id.* at 851-854.

The result of *Bridenbaugh* is that the neighboring states of Illinois, Indiana and Wisconsin may lawfully ban out-of-state

direct shipments of alcohol with in-state exemptions while the Sixth Circuit declares it unconstitutional for Michigan.

The Eleventh Circuit applied a lower level of scrutiny to an out-of-state direct shipment ban that conflicts with the decisions of the Fourth, Fifth and Sixth Circuits. The Eleventh Circuit in *Bainbridge* would uphold local direct shipping exemptions for wineries if a state demonstrates that the statutory scheme is "closely related" to a core power under the 21st Amendment and not a pretext for mere economic protectionism. *Bainbridge,* 311 F.3d at 1114. Under the Eleventh Circuit's decision, the state need not show there are no nondiscriminatory alternatives available and the evidentiary standard for showing core powers is far less than the strict scrutiny standard applied under a Commerce Clause analysis. *Id.* at p. 1114, Fn. 17.

The Fifth and the Fourth Circuits conflict on the remedy that should apply to state alcohol beverage laws found unconstitutional under the Commerce Clause. The Fifth Circuit applies a broad remedy striking the state direct shipment ban and allowing the unregulated flow of alcohol into Texas under the 21st Amendment. *Dickerson,* 336 F.3d at 407-410. In contrast the Fourth Circuit vacated a District Court decision striking down the core provisions of North Carolina's direct shipment ban as being overly broad and applied a "minimum-damage" approach, thereby affording some credence to the state's core concerns underlying the 21st Amendment. *Beskind,* 325 F.3d at 517-520.

The Sixth Circuit's decision creates confusion as to what remedy should be applied when a violation is determined. While Michigan's law allows for out-of-state direct shipment of alcohol by application and issuance of a Commission order [MCL 436.1203(1) App. 49a-52a], the Sixth Circuit did not consider this point in its decision. The Respondents requested that MCL 436.1203(1) and other State importation regulations

be declared invalid. If the relief Respondents request is ordered on remand, as appears to be required by the Court of Appeals' decision, Michigan's regulatory authority over the importation and distribution of alcohol will be gutted. MCL 436.1203(1) is the foundation for Michigan's three-tier system of alcohol importation and distribution. App. 49a-50a. If it and other State importation regulations requested are struck down, the direct shipment of wine, liquor and beer into the State would presumably be authorized. Application of such a broad remedy violates both the spirit and intent behind the 21st Amendment.

This Court has held that the 21st Amendment is "unfettered" by the Commerce Clause. *Ziffrin, Inc. v. Reeves,* 308 U.S. 132, 138 (1939); *Indianapolis Brewing Co. v. Liquor Control Comm'n,* 305 U.S. 391, 394 (1939); *State Bd. of Equalization v. Young's Market Co.*, 299 U.S. 59 (1936).[7] Since that time this Court's decisions have distinguished cases based on circumstances that do not directly impact the importation or distribution of alcohol within a state's territory. The Sixth Circuit, along with the Fourth and Fifth Circuits, fail to recognize the factual distinctions of later cases of this Court, instead employing a virtual *per se* rule of invalidity to discriminatory state direct shipment bans.

Although subsequent decisions of this Court have held State liquor laws unconstitutional under the Commerce Clause, notwithstanding the 21st Amendment, such cases are

[7] The Court of Appeals found it "disingenuous" that Michigan relied upon this Court's precedent establishing that states have the right under the 21st Amendment to regulate the importation of alcohol unfettered by the Commerce Clause. *Heald,* 342 F.3d at 522. App. 8a-9a. However, no Supreme Court case to date has directly overruled those decisions as applied to the circumstances present in this case. Instead, this Court's opinions continue to rely upon these cases. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 514-516 (1996); *North Dakota v. United States,* 495 U.S. 423, 431-433 (1990); *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 346 (1987).

distinguishable. Significantly, none of the cases implicated a state's "core powers" to regulate the "transportation or importation" of intoxicating liquor "for delivery or use therein."[8] One group of cases invalidated statutory provisions that, unlike here, regulated the transportation of alcoholic beverages for delivery to and use in a non-state destination (such as a military base or a destination outside the country) not under the jurisdiction of the state. Another group of cases invalidated state regulations, such as price regulations, that, unlike here, conflicted with existing federal statutes.[9]

A final group of cases invalidated state regulations that, unlike here, were created for purely economic reasons against out-of-state products or had the impermissible extra-territorial effect of regulating commerce in other states. The cases primarily relied upon by the Fourth, Fifth and Sixth Circuits include *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964), *Bacchus Imports, Ltd. v. Dias,* 468 U.S. 263 (1984), and *Healy v. Beer Inst.*, 491 U.S. 324 (1989). These cases, however, are inapposite.

In *Hostetter,* unlike here, ultimate delivery and use of the liquor was in a foreign country and not in New York. This Court has held that regulation not concerning delivery of

[8] See Smokey and the Bandit in Cyberspace, West Law, 19 Const. Comment. 297, 332-333.

[9] See *California Retail Liquor Dealer's Ass'n v. Midcal Alum.*, 445 U.S. 97, 112-114 (1980), (holding that resale price maintenance statute violates Sherman Act, 15 U.S.C. § 1); *Capital Cities Cable Inc. v. Crisp,* 467 U.S. 691, 712-713 (1984) ("when a State has not attempted directly to regulate the sale or use of liquor within its borders - the core § 2 power - a conflicting exercise of federal authority may prevail.")

alcoholic beverages inside the state are not within the core powers of the 21st Amendment.[10] *North Dakota*, 495 U.S. at 431-432. *Hostetter* is not applicable here since all alcohol is destined for consumption in Michigan.

In *Bacchus* the Court invalidated a Hawaii statute exempting locally produced pineapple wine from the state's excise tax that economically discriminated against out-of-state liquor. This Court held that the statute's purpose was not "designed to promote temperance or to carry out any other purpose of the Twenty-first Amendment, but instead . . . the purpose was 'to promote a local industry.'" *Bacchus*, 468 U.S. at 276. In fact, it was pure economic protectionism and the 21st Amendment was never even raised as an issue in that case until it was before this Court. *Bacchus* simply does not apply to the circumstances of this case. Indeed, the District Court below found that Michigan's statutory scheme did not represent mere economic protectionism. App. 34a-35a. Moreover, the tax exemption in *Bacchus* had nothing to do with the policing of importation of alcohol, as do the direct shipping restrictions in Michigan.[11]

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[10] The Court in *Hostetter*, rejected as "an absurd oversimplification" the view that "the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause whenever regulation of intoxicating liquors is concerned." 377 U.S. at 331-332. However, it also characterized as "unquestioned" the view that by virtue of the 21st Amendment "a state is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution or consumption within its borders." *Id.* at 330.

[11] It is only when an alcoholic beverage statute involves some regulatory concern other than a state's core powers under the 21st Amendment that a court must balance state interests against any competing federal interest in regulating commerce. *Midcal Aluminum*, 445 U.S. at 110. Only "other" alcoholic beverage regulations that do not directly regulate importation into a state, require a balancing of state and federal interests in regulating commerce. *Id.*; see also *Capital Cities Cable*, 467 U.S. at 713.

In *Healy*, this Court invalidated a Connecticut price affirmation statute requiring out-of-state sellers to affirm that the prices charged in Connecticut were no higher than prices contemporaneously charged in nearby states. This Court concluded that the statute's effect was to impair the sellers' ability to competitively price products in bordering states. *Healy*, 491 U.S. at 343. The statute had the effect of controlling commercial activity occurring wholly outside the boundary of the state and thus did not impact the state's core powers under the 21st Amendment. No such facts are present here, as Michigan seeks to only regulate the sale, delivery and importation of alcohol within state borders.

II. Michigan's law regulating importation of alcohol is a permissible exercise under the 21st Amendment.

Michigan Liquor Control Code § 203, MCL 436.1203 falls squarely within the core powers that the 21st Amendment reserved to the states. Specifically, § 203 prescribes the conditions under which alcoholic beverages may be sold, delivered or imported into Michigan, as expressly granted by the 21st Amendment.

Section 203 represents a valid exercise of the core powers that this Court has repeatedly recognized. By requiring that alcoholic beverages only be sold to consumers by responsible, accountable, and licensed in-state retailers, this Michigan law provides for an orderly, controlled market in which liquor, a potentially dangerous and frequently abused substance, is not delivered into the wrong hands and ensures that all such transactions are taxed and uniformly regulated.

Requiring that sales and direct shipment to consumers be through a Michigan licensed retailer assures jurisdiction over claims by persons injured as a result of irresponsible sales. Under Michigan's dram-shop law, MCL 436.1801(3), an in-

state retailer who unlawfully sells or provides alcohol to an underage purchaser or visibly intoxicated individual may be held liable for resulting injuries and death. App. 64a-65a. This State law only applies to in-state licensed retailers selling the alcohol and not to unlicensed out-of-state distributors or wineries. *Tennille v. Action Distrib.* Co., 225 Mich. App. 66, 70-73; 570 N.W.2d 130, 132-133 (1997); MCL 436.1113(9). Thus, a Michigan retailer (includes winery) that sells and delivers alcoholic beverages to a Michigan consumer is not only subject to administrative and criminal sanctions, but also may be held accountable to victims of alcohol-related accidents resulting from irresponsible sales. Conversely, Michigan residents injured by alcohol-related accidents resulting from unlawful sales outside the regulatory scheme would have no assurance that out-of-state sellers may be held accountable for their actions.[12]

The limits of a state's authority to regulate alcohol trafficking under the 21st Amendment were discussed in the plurality opinion delivered by Justice Stevens (in which Rehnquist, C.J., White and O'Connor, J.J., joined) in *North Dakota, supra,* 495 U.S. at 426-444, that involved North Dakota's regulations on labeling and reporting alcohol sold to federal military bases within the state. These regulations were upheld despite a challenge based on the Supremacy Clause, where the purchaser of the alcohol was the federal government, whose military bases are not subject to state regulation.

While noting that it had invalidated certain state liquor regulations where the area or transaction fell outside its jurisdiction, the plurality opinion, *id.* at 430-431, stated:

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[12] In *Butler v. Beer Across America*, 83 F. Supp. 2d 1261 (N.D. Ala. 2000), personal jurisdiction was found lacking against a vendor of beer in an action brought by the parents of a fifteen year old who had used his parents' credit card to order beer over the Internet.

> At the same time, however, within the area of its jurisdiction, the State has "virtually complete control" over the importation and sale of liquor and the structure of the liquor distribution system. The Court has made clear that the states have the power to control shipments of liquor during their passage through their territory and to take appropriate steps to prevent the unlawful diversion of liquor into their regulated intrastate markets.

The plurality opinion, *id.* at 433, then noted:

> Given the special protection afforded to state liquor control policies by the Twenty-first Amendment, they are supported by a strong presumption of validity and should not be set aside lightly. [citation omitted]

A state's core powers under the 21st Amendment were delineated in the plurality opinion, *id.* at 439, as follows:

> The labeling and reporting regulations are components of an extensive system of statewide regulation that furthers legitimate interests in promoting temperance and controlling the distribution of liquor, in addition to raising revenue.

In his concurrence, *id.* at 447, Justice Scalia noted:

> The Twenty-first Amendment, which prohibits "the transportation or importation into any state . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof," is binding on the Federal Government like everyone else, and empowers North Dakota to require that all liquor sold for use in the state be purchased from a licensed instate wholesaler. Nothing in our Twenty-first Amendment case law forecloses that conclusion. In

> all but one of the cases in which we have invalidated state restrictions on liquor transactions between the Federal Government and its business partners, the liquor was found not to be for "delivery or use" in the state because its destination was an exclusive federal enclave.

This Court has consistently held that where, as here, a state's law implicates a "core power" under the 21st Amendment, it is immune from challenge and that the primary 21st Amendment "core power" is state control over the importation, sale and distribution process. *North Dakota, supra; Capital Cities Cable,* 467 U.S. at 712. The Court of Appeals' invalidation of Michigan's importation, sale and distribution process, is in conflict with these decisions because it obliterates Michigan's most basic "core power" secured by the 21st Amendment.

In addition to recognizing the State's primary core power under the 21st Amendment to regulate the transportation and importation of alcoholic beverages for sale within the State, this Court recognizes that states have other legitimate concerns (such as collection of tax revenues) when structuring a distribution system for alcoholic beverages. *North Dakota,* 495 U.S. at 432.

This case involves the "transportation or importation" of "intoxicating liquors" into Michigan "for delivery or use therein." Michigan law treats all such deliveries in the same way by requiring delivery to be accomplished by licensed and responsible parties that are accountable to Michigan and its citizens. Such an exercise is expressly within the State's core powers under the 21st Amendment. It advances legitimate State interests in promoting temperance, raising revenue, ensuring an orderly market and jurisdiction and accountability over the seller where redress for injuries is required.

III. Using its Commerce Clause powers Congress has expressly delegated to the states the right to regulate the shipment and transportation of alcoholic beverages within its territory.

The Court of Appeals erred in analyzing this case under the "dormant Commerce Clause," because the Clause is not dormant here. This is because Congress exercised its Commerce Clause power in the Webb-Kenyon Act, 27 U.S.C. § 122, that provides "The shipment or transportation . . . of any . . . vinous . . . intoxicating liquor . . . into any state . . . to be . . . sold . . . in violation of *any law* of such state . . . is prohibited." (emphasis added). Thus Congress has unmistakably exercised its power under the Commerce Clause to reinforce and prevent from encroachment those state rights unambiguously provided for in the 21st Amendment. The Court of Appeals, however, has invalidated a state right that both the 21st Amendment and a federal statute not only permit, but expressly provide for.

Congress has power to regulate commerce among the states. However, any supposed residual dormant power is dispelled in that Congress has expressly exercised that Commerce Clause power in 27 U.S.C. § 122. The language "any law" in that statute plainly indicates the states occupy the field. A broader term than "any" is inconceivable. The residual power under the Commerce Clause, not displaced by the 21st Amendment, resides with Congress. Congress, therefore, has added its full weight under the Commerce Clause to the 21st Amendment to strengthen states' sovereign rights.

IV. The Court of Appeals clearly applied the wrong level of scrutiny and accorded no deference to Michigan's law regulating the importation and shipment of alcoholic beverages.

The Court of Appeals' decision that Michigan's alcohol importation law is facially unconstitutional has significant

consequences on the level of scrutiny applied. *Heald,* 342 F.3d at 524-525. App. 13a-14a. A lower level of scrutiny is applied when a statute is not facially invalid. *Id.* In contrast to facial violations, remedies for as applied violations are greatly limited.

A court may declare a statute unconstitutional by: (1) declaring it invalid on its face, or (2) finding the statute unconstitutional as applied to a particular set of circumstances. The difference is important. If a court holds a statute unconstitutional on its face, the state may not enforce it under any circumstances. To do so, however, there must be no set of circumstances under which the statute is validly applied. In contrast, when a court holds a statute unconstitutional as applied to particular facts, the state may enforce the statute in different circumstances. *U.S. v. Salerno,* 481 U.S. 739, 745 (1987); *Sam & Ali v. Ohio Dep't of Liquor Control,* 158 F.3d 397, 402, Fn. 7 (6th Cir. 1998).

In analyzing Michigan's statutory scheme for facial unconstitutionality focus must be put on the statute itself and not how its Liquor Control Commission decides to apply or enforce it. Important statutory provisions allowing for the out-of-state direct shipment of wine to bypass the three-tier system were overlooked by the Court of Appeals in declaring Michigan's statute facially invalid. The Court of Appeals failed to recognize that such shipments can bypass the three-tier system in certain instances and nonetheless receive approval by Commission order. MCL 436.1203(1), (6), and (7)(a) and (b). App. 49a-52a. It is irrelevant that the Liquor Control Commission exercises its discretion under the statute to generally deny such requests. This is critical as the Respondents' challenge to the Michigan statutory scheme was a facial attack and the Court of Appeals' opinion found the statutory scheme facially discriminatory, applying a strict scrutiny analysis.

State Administrative Rule 436.1719(4) is incorrectly cited in the Court of Appeals' opinion for the proposition that shipments of wine can only be made to licensed wholesalers in the state except upon written order of the Commission. *Heald,* 342 F.3d at 521. App. 6a. The correct citation is Rule 436.1719(5). App. 70a-71a. However, that rule, like the statute, authorizes interstate direct shipments of alcohol by Commission order, which can bypass wholesalers. The only State statutory provision mentioned in the Court of Appeals' opinion is MCL 436.1113(9). *Id.* at 521. App. 6a. That statute defines "Winemaker" as any person licensed by the Commission to manufacture wine and sell, at wholesale or retail, wine manufactured by that person.

Remarkably, the Court of Appeals held that Michigan's statute was facially invalid despite the concession in Respondents' appellate brief that there was nothing in the Michigan law that prohibits out-of-state direct sales and shipments of beverage alcohol.[13]

There is no dispute that the Liquor Control Commission generally exercises its discretion under the law prohibiting out-of-state direct shipments and informs the public that such shipments are or may be illegal. However, the statutory scheme does not facially prohibit it. Simpler than the granting of a licensing application,[14] the Commission, by order, can authorize the direct shipment of out-of-state wine. MCL 436.1203(1). MCL 436.1203(1) was the focus of Petitioner's appellate brief before the Court of Appeals and this very issue

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[13] The Respondents acknowledged in their Sixth Circuit appellate brief "there is no express provision that an out-of-state merchant may not sell and deliver directly to Michigan residents" under Michigan's law. Appellant's Brief, pg. 3, Fn. 1.

[14] *Morris & Doherty, P.C. v. Lockwood*, 259 Mich. App. 38, 47 (2003); *Kudla v. Modde,* 537 F. Supp. 87, 89-90 (E.D. Mich, 1982). (There is no vested property interest in the granting of a license anymore than there is the granting of an order to direct ship.)

was raised to the court in the State's Petition for Rehearing *En Banc*. It was apparently not considered by the Court of Appeals and is material in determining whether Michigan law is facially unconstitutional.

Nor is the effect of the Court of Appeal's decision limited to the direct shipment of wine. If MCL 436.1203 and MCL 436.1909[15] are held unenforceable as requested by Respondents, there may likewise be nothing prohibiting the direct shipment of beer and spirits into the State. For example, if MCL 436.1113(9); 1203; 1909 are stricken or held unenforceable there would be no effective State three-tier system for alcohol distribution and there would be a dismantling of State regulatory authority to detour shipments of alcohol to minors. No longer would there be authority under MCL 436.1909 to prosecute unlicensed and unapproved sales of alcohol.[16]

State statutes enjoy a presumption of constitutionality. A state's interest in prohibiting the diversion of liquor into its territory is supported by a strong presumption of validity and should not be lightly set aside. *North Dakota*, 495 U.S. at 433. When reviewing a state statute, courts must construe it to avoid constitutional difficulty, giving deference to the statute whenever possible. *Webster v. Reproductive Health Services*, 492 U.S. 490, 514 (1989). Facial challenges to state statutes are the most difficult to mount successfully since it must be

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[15] MCL 436.1909 criminalizes the unapproved or unlicensed sale of alcoholic beverages. App. 69a.

[16] Ironically, the effect of the Sixth Circuit's decision is to leave licensed in-state entities subject to regulations that have not been stricken, while out-of-state importers would be free of any regulation.

established that no set of circumstances exists under which the Act would be valid. *U.S. v. Salerno*, 481 U.S. at 745.[17]

Had the Court of Appeals followed its own precedent in *Coleman v. Dewitt*, 282 F.3d 908, 914 (6th Cir. 2002), *cert. denied* 536 U.S. 914 (2002), and applied the *Salerno* "no set of circumstances" test to the Michigan statute it would have been compelled to find no facial violation. Clearly, the Michigan statute had a constitutional application. The constitutional application is that interstate direct shipments of wine are permissible either through the discretion of a Commission order or by other legal means under the State's statutory scheme. MCL 436.1203(1), (6), (7). App. 49a-52a.

In not applying the appropriate standard of review to the State statute, the Court of Appeals' decision conflicts with decisions of this Court and deprives Michigan the deference its laws are due in a case of unquestioned importance.

V. Even without considering the specific grant of powers under the 21st Amendment, Michigan's statutory scheme does not violate the Commerce Clause.

The Commerce Clause grants to Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art I, § 8, cl. 3. "[T]hough phrased as a grant of regulatory power to Congress, the Clause has long been understood to have a "negative" aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles

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[17] *S.D. Myers, Inc. v. City & County of San Francisco*, 253 F.3d 461, 467 (9th Cir. 2001) (applying *Salerno* to a Commerce Clause challenge and holding that the plaintiff "must establish that no set of circumstances exists under which the [challenged ordinance] would be valid" also applied in another Commerce Clause case, *U.S. v. Sage*, 92 F.3d 101, 106 (2nd Cir. 1996), *cert. denied*, 519 U.S. 1099 (1997).

of commerce." *Oregon Waste Sys, Inc. v. Dep't of Envt'l Quality*, 511 U.S. 93, 98 (1994).

The restriction imposed on states by the Commerce Clause is not absolute and "the states retain authority under their general police powers to regulate matters of legitimate local concern, even though interstate commerce may be affected." *Maine v. Taylor,* 477 U.S. 131, 138 (1986). The Commerce Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations. *Exxon Corp. v. Governor of Maryland,* 437 U.S. 117, 127 (1978).

Brown & Williamson v. Pataki, 320 F.3d 200 (2nd Cir. 2003) provides a useful standard for evaluating dormant Commerce Clause challenges to state statutes. That case involved a challenge to a New York statute regulating the distribution of cigarettes. The provision prohibited most direct shipments of cigarettes to New York residents. As a result, sales had to be made by "brick and mortar" retailers. Out-of-state retailers who wished to ship cigarettes directly to New York consumers contended that the statute violated the dormant Commerce Clause. The District Court's holding that the statute violated the "dormant" Commerce Clause was reversed and the Second Circuit held, instead, that there was no violation sufficiently establishing a discriminatory effect in violation of the Commerce Clause. *Id.* at 210.

The Second Circuit in applying this Court's balancing test under *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), explained the constitutional inquiry as follows:

> [W]here the statute regulates even handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.

Michigan does not unlawfully discriminate against out-of-state shippers of wine. This Court finds unlawful discrimination only when a state discriminates among similarly situated in-state and out-of-state interests. *Brown & Williamson*, 320 F.3d at 216; *Ford Motor Co. v. Tex. DOT*, 264 F.3d 493, 500 (5th Cir. 2001), citing *Exxon Corp.*, 437 U.S. at 125-126. Out-of-state wineries are not similarly situated to in-state wineries for regulation purposes. Important State policing concerns justify the diversion of potentially large quantities of wine shipped from the numerous out-of-state wineries compared to the few from in-state wineries. Michigan wishes to use an hourglass type of system for screening out-of-state shipments to prevent sales to minors, ensure applicable excise and sales taxes are collected, and that equal exposure to the State's strict alcohol regulatory regiment is achieved.

Michigan's three-tier system applies equally to all in-state retailers, wholesalers and producers of alcohol with very limited exceptions. The magnitude of direct shipments by in-state wineries is inconsequential compared to those that would come from the numerous wine producers selling outside the State and regulatory control over that number of out-of-state shippers is not practicable without a three-tier system of distribution. See Fn. 4, *infra*. As found in *Brown & Williamson,* out-of-state shippers are nonbrick-and-mortar sellers and even if they ". . . did demonstrate that it would be 'unworkable' and 'uneconomic' for them to establish brick-and-mortar outlets [within the state], that is insufficient to establish a discriminatory effect." *Brown & Williamson,* 320 F.3d at 212.

Michigan does not prevent out-of-state wineries from obtaining winemaker licenses if they establish a presence in the State and comply with its laws. Nor does Michigan unduly burden the importation of beverage alcohol. MCL 436.1203(1) applies to every sale, delivery, or importation of alcoholic

liquor. The statute does not unlawfully discriminate between in-state and out-of-state origin, it merely provides regulatory safeguards for the direct shipment of alcoholic liquor. Alcohol is not an innocuous commodity such as cheese. Moreover, out-of-state wineries wanting to directly sell and ship beverage alcohol into Michigan are not similarly situated to in-state wineries for policing purposes.

Applying the *Pike* balancing test, the Second Circuit found the New York statute constitutional. It determined that "the regulation of the importation and sale of cigarettes, even if this regulation discourages the importation of cigarettes," has been recognized as a "legitimate exercise of state power in the public interest," and . . . the statute's "burdens on interstate commerce are not excessive relative to its local benefits." *Brown & Williamson,* 320 F.3d at 216-17. Likewise, Michigan's control over out-of-state direct sales and shipments of beverage alcohol to deter wide spread sales to minors and to ensure proper collection of taxes is of paramount public interest and is a legitimate State policing power recognized by this Court's jurisprudence. As the District Court below found, Michigan's system places a minimal or incidental burden on interstate commerce. App. 34a-35a, 38a-39a. That incidental burden is not excessive relative to its local benefits and does not violate the Commerce Clause.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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February, 2004

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ELEANOR HEALD; RAY HEALD; JOHN ARUNDEL; KAREN BROWN; RICHARD BROWN; BONNIE MCMINN; GREGORY STEIN; MICHELLE MORLAN; WILLIAM HORWATH; MARGARET CHRISTINA; ROBERT CHRISTINA; TRISHA HOPKINS; JIM HOPKINS; DOMAINE ALFRED, INC.,
Plaintiffs-Appellants,

v.

JOHN ENGLER, Governor; JENNIFER M. GRANHOLM, Attorney-General; JACQUELYN STEWART, Chairperson, Michigan Liquor Control Commission, in their Official Capacities,
Defendants-Appellees,

Michigan Wine & Beer Wholesalers Association,
Intervening Defendant-Appellee.

No. 01-2720

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 00-71438 – Bernard A. Friedman,
District Judge.

Argued: May 7, 2003

Decided and Filed: August 28, 2003

Before: GUY, BOGGS, and DAUGHTREY, Circuit Judges.

COUNSEL

ARGUED: James A. Tanford, INDIANA UNIVERSITY SCHOOL OF LAW, Bloomington, Indiana, for Appellants. Donald S. McGehee, OFFICE OF THE ATTORNEY GENERAL, MICHIGAN LIQUOR CONTROL COMMISSION, Lansing, Michigan, Anthony S. Kogut, WILLINGHAM & COTE', East Lansing, Michigan, for Appellees. **ON BRIEF:** James A. Tanford, INDIANA UNIVERSITY SCHOOL OF LAW, Bloomington, Indiana, for Appellants. Irene M. Mead, OFFICE OF THE ATTORNEY GENERAL, MICHIGAN LIQUOR CONTROL COMMISSION, Lansing, Michigan, Anthony S. Kogut, WILLINGHAM & COTE', East Lansing, Michigan, for Appellees. Louis R. Cohen, WILMER, CUTLER & PICKERING, Washington, D.C., William H. Mellor, Steven M. Simpson, INSTITUTE FOR JUSTICE, Washington, D.C., Clint Bolick, INSTITUTE FOR JUSTICE, Phoenix, Arizona, for Amici Curiae.

OPINION

MARTHA CRAIG DAUGHTREY, Circuit Judge. In this civil rights action brought pursuant to 42 U.S.C. § 1983, the plaintiffs raise a constitutional challenge to Michigan's alcohol distribution system, contending that state provisions differentiating between in-state and out-of-state wineries violate the Commerce Clause.[1] Those regulations prohibit the

[1]Similar actions have been brought challenging direct shipment bans in North Carolina, Virginia, Indiana, Texas, Florida and New York, among other states. *See, e.g., Beskind v. Easley,* 325 F.3d 306 (4th Cir. 2003) (affirming lower court finding that North Carolina's statutory scheme discriminates between in-state and out-of-state wineries, violates the Commerce Clause, and is not "saved" by the Twenty-first Amendment); *Bainbridge v. Turner,* 311 F.3d 1104, 1115 (11th Cir. 2002) (finding that Florida's alcohol distribution statutes' differentiation between in-state and out-of-state wineries facially discriminates against interstate commerce and remanding for further fact-finding on whether Florida's statutory scheme is "necessary to effectuate the . . . core concern [of revenue raising] in a way that justifies treating out-of-state firms differently from in-state firms"); *Bridenbaugh v. Freeman-Wilson,* 227 F.3d 848, 851 (7th Cir. 2000) (finding that Indiana's ban on direct shipment from out-of-state wineries is constitutional because " § 2 of the twenty-first amendment empowers Indiana to control alcohol in ways that it cannot control cheese"); *Swedenburg v. Kelly,* 232 F. Supp. 2d 135 (S.D. N.Y. 2002) (finding that New York's ABC law's ban on direct shipment of out-of-state wine is unconstitutional); *Dickerson v. Bailey,* 212 F. Supp. 2d 673, 695 (S.D. Tex. 2002) (finding that Texas's ban on direct shipment by out-of-state wineries violates the dormant Commerce Clause and noting that the state had "fail[ed] to demonstrate how a statutory exception for local wineries from Texas' three-tier regulatory system . . . is justified by any of the traditional core concerns of the twenty-first amendment" or to show "that the core interests of taxation and orderly market conditions . . . could not be effected by alternative, nondiscriminatory options for these out-of-state wineries"), *aff'd, Dickerson v. Bailey,* 336 F.3d 388 (5th Cir. 2003); *Bolick v. Roberts,* 199 F. Supp. 2d 397, 409 (E.D.Va. 2002) (adopting, with amendments, magistrate judge's findings that Virginia's ABC laws violated the dormant Commerce Clause and that the state had failed to produce "any meaningful evidence" showing that the state cannot "accomplish its legitimate interests without discriminating against out-of-state direct shippers of wine"), *vacated by Bolick v. Danielson,* 330 F.3d 274 (4th Cir. 2003) (remanding for reconsideration in light of intervening change in applicable statutes); *see also Cooper v. McBeath,* 11 F.3d 547 (5th Cir. 1994) (striking down Texas's three-year durational residency and citizenship requirements for obtaining a liquor permit because these restrictions violated the dormant Commerce Clause and were not "saved" by the Twenty-first Amendment).

direct shipment of alcoholic beverages from out-of-state wineries, while allowing in-state wineries to ship directly to consumers, provided that the in-state wineries comply with certain minimal regulatory requirements. The plaintiffs, who include wine connoisseurs, wine journalists, and one small California winery that ships its wines to customers in other states, claim that this system is unconstitutional under the dormant Commerce Clause because it interferes with the free flow of interstate commerce by discriminating against out-of-

state wineries. The defendants, who include Michigan officials (referred to collectively in this opinion as "the state") and the intervening trade association, argue in response that Michigan's regulatory scheme is constitutional under the Twenty-first Amendment to the federal constitution.

The parties filed cross-motions for summary judgment, and the district court granted the state's motion and denied the plaintiffs' motion. The plaintiffs then filed a motion to reconsider, arguing that the district court should have addressed cross-motions to strike various evidence submitted by the two sides prior to the summary judgment decision.[2] The

[2]Affidavits submitted by the plaintiffs included statements from various oenophiles; the Healds, who are wine critics and consultants; Domaine Alfred, a California winery; and several other wine and alcohol manufacturers and distributers. Many of the affiants attested to their desire to have wine from out-of-state wineries shipped directly to their homes, their inability to do so, the general unavailability of certain wines in Michigan, and the willingness of the wineries and distributors to pay required taxes and obtain necessary permits, if allowed to ship directly to consumers.

Documents filed on behalf of the defendants included reports from the Michigan Department of Treasury, Office of Revenue and Tax Analysis, which detailed estimates of lost tax revenue to remote sales; an affidavit from the manager of the Manufacturers and Wholesalers Section of the Licensing Division of the Michigan Liquor Control Commission that listed all licensed "Outstate Seller of Wine" license holders; an affidavit from the director of the Licensing Division of the Michigan Liquor Control Commission averring that, of the wineries from which the plaintiffs wish to purchase wine, some are licensed as out-of-state sellers, and the others have not applied for such licenses; an affidavit from the director of the Enforcement Division of the Michigan Liquor Control Commission detailing the number of "controlled buy operations" conducted by the Commission in Michigan to identify retailers that sell alcohol to minors; an affidavit from an assistant in the Liquor Control Division of the Michigan Department of Attorney General, detailing controlled buy operations conducted over the internet; and an (unsworn) statement by Sen. Orrin Hatch, made before the Senate Judiciary Committee, entitled "Interstate Alcohol Sales and the 21st Amendment."

district court denied the motion to reconsider, noting that it had effectively denied the cross-motions to strike as moot, because it did not consider the challenged evidence in deciding the summary judgment motions.

The plaintiffs now appeal both the grant of summary judgment and the denial of their motion to reconsider. For the reasons set out below, we conclude that the regulations in question are discriminatory in their application to out-of-state wineries, in violation of the dormant Commerce Clause, and cannot be justified as advancing the traditional "core concerns" of the Twenty-first Amendment. We therefore reverse the district court's judgment and remand the case with directions to the district court to enter judgment in favor of the plaintiffs.

PROCEDURAL AND FACTUAL BACKGROUND

Michigan regulates alcohol sales under a "three-tier system": consumers must purchase alcoholic beverages from licensed retailers; retailers must purchase them from licensed wholesalers; and wholesalers must purchase them from licensed manufacturers. This system is similar to that used by most states. *See* Vijay Shankar, *Alcohol Direct Shipment Laws*, 85 Va. L. Rev. 353, 355 (1999).

The plaintiffs allege that Michigan's system discriminates against out-of-state wineries in favor of in-state wineries because it prevents out-of-state wineries from shipping wine directly to Michigan consumers, which in-state wineries are allowed to do. As the district court correctly noted, this distinction between in-state and out-of-state wineries can only be understood by reading a number of provisions in conjunction with each other:

> [The distinction] can be gleaned from various Michigan Liquor Control Commission regulations, which are codified within the

Michigan Administrative Code. R436.1057 states that "[a] person shall not deliver, ship, or transport into this state beer, wine, or spirits without a license authorizing such action. . . ." The only applicable license, an "outstate seller of wine license," may according to R436.1705(2)(d) be obtained by a "manufacturer which is located outside of this state, but in the United States, and which produces and bottles its own wine." However, under R436.1719(4) the holder of such a license may ship wine "only to a licensed wholesaler at the address of the licensed premises except upon written order of the commission." In answers to interrogatories, a representative of the Michigan Liquor Control Commission indicates that "[a]t present, there is no procedure whereby an out-of-state retailer or winery can obtain a license or approval to deliver wine directly to Michigan residents . . . ."

> In contrast, the Michigan Liquor Control Commission indicates that the "ability to deliver wine to the consumer is available to winemakers licensed in Michigan, inasmuch as under the provisions of MCL 436.1113(9) these licensees are permitted to sell at retail the wines they manufacture. . . . A licensed Michigan winemaker may deliver their [sic] own products to customers without an SDM [specially designated merchant] license . . . .

The plaintiffs contend that this differential treatment of in-state and out-of-state wineries violates the dormant Commerce Clause because it gives in-state wineries a competitive advantage over out-of-state wineries. In-state wineries can, for example, bypass the price mark-ups of a wholesaler and retailer, making in-state wines relatively cheaper to the

consumer and allowing them to realize more profit per bottle. In addition, the cost to an out-of-state winery of the license that enables it to sell to a Michigan wholesaler is $300, while a comparable Michigan winery must pay only a $25 license fee to qualify to ship wine directly to Michigan customers. Finally, for customers who desire home delivery, Michigan wineries have a competitive advantage over out-of-state wineries that cannot ship directly to customers. In response, the state argues that the regulations to which an in-state winery is subject "more than offset, both in costs and burden, any nominal commercial advantage given by the ability to deliver directly to customers" and characterizes the burden on out-of-state wineries as "de minimis."

In its order granting summary judgment to the state and denying summary judgment to the plaintiffs, the district court held that "Michigan's direct shipment law is a permitted exercise of state power under § 2 of the 21st Amendment" because it is not "mere economic protectionism." In reaching this conclusion, the court found that Michigan's statutory scheme was designed "to ensure the collection of taxes from out-of-state wine manufacturers and to reduce the risk of alcohol falling into the hands of minors."

After this order had issued, the plaintiffs filed a motion to reconsider, asking the district court to rule on the motions to strike before granting either side summary judgment and to "make specific findings of fact based on the record" before reaching a final decision. The plaintiffs argued that the district court's failure to rule on the motions to strike "left the record devoid of evidence supporting the court's conclusion that the direct shipment law furthers legitimate 21st Amendment purposes," and that the court had applied the incorrect legal standard in dismissing the complaint. The district court denied the plaintiffs' motion for reconsideration, saying that it had not considered the challenged evidence in ruling on the summary

judgment motions and that the motions to strike were effectively denied as moot.

For the reasons set out below, we reverse the district court's judgment, vacate the order granting summary judgment in the state's favor, and remand the case for entry of summary judgment in favor of the plaintiffs.

DISCUSSION

The central question in this case is how the "dormant" Commerce Clause and the Twenty-first Amendment interact to limit the ways in which a state can control alcohol sales and distribution. Article I, Section 8, Clause 3 of the United States Constitution grants Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ." The Supreme Court has long held that "this affirmative grant of authority to Congress also encompasses an implicit or 'dormant' limitation on the authority of the States to enact legislation affecting interstate commerce." *Healy v. The Beer Institute,* 491 U.S. 324, 326 n.1 (1989) (citations omitted).

In 1933, Congress enacted the Twenty-first Amendment, which repealed the 18th Amendment, thereby ending Prohibition. Section 2 of the Twenty-first Amendment prohibits "[t]he transportation or importation into any State, Territory or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof . . . ." Initially, the Supreme Court afforded the states nearly limitless power to regulate alcohol under the new amendment. *See, e.g., Ziffrin, Inc. v. Reeves,* 308 U.S. 132, 138 (1939) ("The Twenty-first Amendment sanctions the right of a state to legislate concerning intoxicating liquors brought from without, unfettered by the Commerce Clause."); *Indianapolis Brewing Co. v. Liquor Control Comm'n,* 305 U.S. 391, 394 (1939) ("Since the Twenty-first Amendment . . . the right of a state to

prohibit or regulate the importation of intoxicating liquor is not limited by the Commerce Clause. . . ."); *State Bd. of Equalization v. Young's Market Co.,* 299 U.S. 59 (1936).

The state relied on these cases in the district court, but we find that reliance disingenuous at best because, as early as the 1960s, the Supreme Court signaled a break with this line of reasoning. In *Hostetter v. Idlewild Bon Voyage Liquor Corp.,* 377 U.S. 324, 331-32 (1964), a case involving the prohibition of liquor sales to departing international airline travelers, the Court observed:

> To draw a conclusion from this line of decisions [*Ziffrin*, *Young's Market*, etc.] that the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause wherever regulation of intoxicating liquors is concerned would, however, be an absurd oversimplification. If the Commerce Clause had been pro tanto 'repealed,' then Congress would be left with no regulatory power over interstate or foreign commerce in intoxicating liquor. Such a conclusion would be patently bizarre and is demonstrably incorrect. . . .
>
> Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case.

The Supreme Court's approach to cases involving the intersection of the Commerce Clause and the Twenty-first Amendment has continued to develop since *Hostetter*. In *Capital Cities Cable v. Crisp,* 467 U.S. 691 (1984), although not a liquor importation or Commerce Clause case, the Court

> found that a state ban on alcohol advertising conflicted with regulations of the Federal Communications Commission. The Court applied a balancing test to determine "whether the interests implicated by a state regulation are so closely related to the powers reserved by the [Twenty-first] Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies." *Id.* at 714. The Court concluded that the federal interest must prevail because the state's banning of alcohol advertising did not directly relate to the core concerns of the Twenty-first Amendment, *i.e.*, to exercise "control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *Id.* at 715 (quotation omitted).

In subsequent cases, the Supreme Court has continued to analyze challenges to state alcohol laws by determining how closely related the law in question is to the "core concerns" of the Twenty-first Amendment. Shortly after *Capital Cities* was decided, the Court issued *Bacchus Imports v. Dias,* 468 U.S. 263 (1984), in which out-of-state wholesalers challenged a Hawaii excise tax exemption for certain locally produced alcoholic beverages. The state argued that the statute advanced legitimate state interests, that it imposed no patent discrimination against interstate trade, and that the effect on interstate commerce was minimal. *Id.* at 270. The Court rejected these defenses, finding that "the legislation constitutes 'economic protectionism' in every sense of the phrase," *id. at 272*, and noting that "one thing is certain: The central purpose of the [21st Amendment] was not to empower States to favor local liquor industries by erecting barriers to competition." *Id.* at 276. Instead, the Court considered "whether the principles underlying the [Twenty-first] Amendment are sufficiently implicated by the [tax exemption] to outweigh the Commerce

Clause principles that would otherwise be offended." *Id.* at 275. In *Bacchus*, the state did not contest that the law's purpose was "to promote a local industry," so the Court did not have to engage in the normal Commerce Clause analysis of whether the law was sufficiently closely related to the promotion of lawful interests to vitiate its discriminatory effect. Instead, it found that the law discriminated against interstate commerce in violation of the Commerce Clause and was therefore unconstitutional.

Since *Bacchus*, the Supreme Court has been less than prolific in construing the content of the Twenty-first Amendment's "core concerns," addressing the definition of "core concerns" only once - and then only in a plurality opinion. In *North Dakota v. United States,* 495 U.S. 423 (1990), the Court had before it an intergovernmental immunity case, rather than a Commerce Clause challenge. At issue was whether North Dakota's reporting and labeling requirements were constitutional, despite interfering with contrary federal interests in selling liquor to military personnel. The Court upheld the statute, finding that the state regulations "fall within the core of the State's power under the *Twenty-first Amendment*" because they were enacted "[i]n the interest of promoting temperance, ensuring orderly market conditions, and raising revenue . . . ." *Id.* at 432.

But, because *North Dakota* did not involve a Commerce Clause challenge, the *analysis* in the plurality opinion cannot be taken to control the analysis in this case. That is, we do not interpret the "in the interest of" language to mean that a state need only be *motivated* by the "core concerns" of the Twenty-first Amendment to shield its laws from constitutional scrutiny. Under a Commerce Clause analysis, facially discriminatory laws are still subject to strict scrutiny, meaning that the state must demonstrate that no reasonable nondiscriminatory alternatives are available to advance the same legitimate goals. *See, e.g., Hughes v. Oklahoma,* 441 U.S. 322, 336-7 (1979)

(finding that, "at a minimum," a statute that "on its face discriminates against interstate commerce . . . invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives"). Likewise, the language in *North Dakota* to the effect that the states have "virtually complete control" over the importation and sale of liquor, although heavily emphasized by the district court in this case, has little value in a case requiring a Commerce Clause analysis. Because *North Dakota* did not involve interpretation of the Commerce Clause, we reject the implication that a state's "virtually complete control" over liquor regulation enables it to discriminate against out-of-state interests in favor of in-state interests. *Bacchus* simply forbids such an analysis.

Given this background, we cannot endorse the district court's characterization of the regulation in this case as a constitutionally benign product of the state's three-tier system and, thus, "a proper exercise of [Michigan's Twenty-first Amendment] authority, despite the fact that such a system places a minor burden on interstate commerce." Instead, we invoke Justice Scalia's view, expressed in an opinion concurring in the Supreme Court majority's decision striking down a state price-affirmation statute, in which he explained that:

> [The law's] invalidity is fully established by its facial discrimination against interstate commerce . . . . This is so despite the fact that the law regulates the sale of alcoholic beverages, since its discriminatory character eliminates the immunity afforded by the Twenty-first Amendment.

Healy v. Beer Institute, 491 U.S. 324, 344 (1989) (Scalia, J., concurring) (citations omitted).

The proper approach in this case, then, is to apply the traditional dormant Commerce Clause analysis and, if the

provisions are unconstitutional under the Commerce Clause, to determine whether the state has shown that it has no reasonable nondiscriminatory means of advancing the "core concerns" of the Twenty-first Amendment.

In reviewing challenges brought under the Commerce Clause, the Supreme Court has long held that statutes that facially discriminate are "virtually *per se*" invalid, citing as a clear example "a law that overtly blocks the flow of interstate commerce at a State's borders." *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). However, a lower level of scrutiny is applied when a statute does not discriminate on its face:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . [T]he extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Id., *quoting Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Moreover, we have recognized the following test for determining whether state economic regulations violate the dormant Commerce Clause:

> When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, [the Supreme Court has] generally struck down the statute without further inquiry. When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, [the Supreme Court

> has] examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits. In either situation the critical consideration is the overall effect of the statute on both local and interstate activity.

McNeilus Truck & Mfg., Inc. v. Ohio ex rel. Montgomery, 226 F.3d 429, 442 (6th Cir. 2000) (quotations omitted).

As we indicated in *McNeilus*, the proper starting point for dormant Commerce Clause analysis is to determine whether, in fact, the state provision "directly, in effect, or in purpose treats in-state and out-of-state interests differently . . . ." *Id.* If a court finds that the statute does discriminate, then the issue becomes, applying "rigorous scrutiny [,] . . . whether the statute serves a legitimate state interest that cannot otherwise be met." *Id.* In other words, laws that facially discriminate are normally invalid, unless they advance "a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *New Energy Co. of Ind. v. Limbach,* 486 U.S. 269, 278 (1988) (citations omitted).

Here, it is clear that the Michigan statutory and regulatory scheme treats out-of-state and in-state wineries differently, with the effect of benefitting the in-state wineries and burdening those from out of state. As discussed above, Michigan wineries enjoy both greater access to consumers who wish to have wine delivered to their homes, and greater profit through their exemption from the three-tier system. Out-of-state wineries, on the other hand, must participate in the costly three-tier system, to their economic detriment and, although this is not clear from the record, may be shut out of the Michigan market altogether if unable to obtain a wholesaler. The Fourth Circuit reached a similar conclusion in a case considering North Carolina's alcohol distribution system, which is nearly identical to Michigan's. In *Beskind v. Easley,*

325 F.3d 506 (4th Cir. 2003), the court found that North Carolina's alcohol distribution laws, which discriminate against out-of-state wineries in favor of in-state wineries, are unconstitutional unless "the State can show that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Id.* at 515 (internal quotations and citations omitted).

Having determined that the provision is facially discriminatory, we now turn to the question of whether the regulatory scheme is nevertheless constitutional because it "fall[s] within the core of the State's power under the Twenty-first Amendment," having been enacted "in the interest of promoting temperance, ensuring orderly market conditions, and raising revenue," *North Dakota v. United States,* 495 U.S. 423, 432 (1990), and because these interests "cannot be adequately served by reasonable nondiscriminatory alternatives." *New Energy Co. of Ind. v. Limbach,* 486 U.S. 269, 278 (1988) (citations omitted).

> We conclude, based on the evidence in the record, that defendants have not shown that the Michigan scheme's discrimination between in-state and out-of-state wineries furthers any of the concerns listed above, much less that no reasonable non-discriminatory means exists to satisfy these concerns. This is so even if, taking the evidence in the light most favorable to defendants, we assume that all of the evidence they submitted was admissible. It is important to keep in mind that the relevant inquiry is not whether Michigan's three-tier system *as a whole* promotes the goals of "temperance, ensuring an orderly market, and raising revenue," but whether the discriminatory scheme challenged in this case - the direct-shipment ban for out-of-state wineries - does so. *See, e.g., Beskind,* 325 F.3d at 517 ("The question is not whether North Carolina can advance its regulatory purpose by imposing fewer burdens on in-state wineries than out-of-state wineries . . . . Rather, the question is whether *discriminating* in favor of in-state wineries . . . serves a Twenty-first Amendment

interest."). Obviously, the state bears the burden of justifying a discriminatory statute, and "the standards for such justification are high." *New Energy Co.*, 486 U.S. at 278; *see also Cooper v. McBeath*, 11 F.3d 547, 553 (5th Cir. 1994) (describing the burden of proof faced by the state as "towering"); *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979) ("[F]acial discrimination by itself may be a fatal defect. . . . [A]t a minimum [it] invokes the strictest scrutiny.").

The district court correctly recognized that state liquor laws are not completely immune from Commerce Clause challenges, but it placed too much reliance on Supreme Court precedent that has specifically upheld the three-tier distribution system, quoting *North Dakota v. United States*, 495 U.S. at 431, for the proposition that the states have "virtually complete control" over the importation and sale of liquor. As we noted above, however, *North Dakota* involved a Supremacy Clause challenge and did not implicate the Commerce Clause. It therefore cannot be relied on in this case in light of Supreme Court cases that do discuss the intersection of the Twenty-first Amendment and the Commerce Clause, such as *Bacchus*.

Nor do we find persuasive the district court's reliance on three additional cases. One, *House of York, Ltd. v. Ring*, 322 F. Supp. 530 (S.D.N.Y. 1970), is a district court opinion that pre-dates *Bacchus*. The second, *Bainbridge v. Bush*, 148 F. Supp. 2d 1306 (M.D.Fla. 2001), has subsequently been reversed. *See Bainbridge v. Turner*, 311 F.3d 1104 (11th Cir. 2002) (holding that the state must show that an alcohol-distribution statute that discriminates between in-state and out-of-state wineries furthers core concerns of the Twenty-first Amendment in order to survive a Commerce Clause challenge). The third, *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000), is the sole federal court of appeals decision to find that analogous direct shipment laws are constitutional under the Twenty-first Amendment. However, *Bridenbaugh* is distinguishable on its facts, and it has been criticized by several

federal courts for its failure to engage in the requisite dormant Commerce Clause analysis. *See, e.g., Bolick v. Roberts*, 199 F. Supp. 2d 397, 408 (E.D. Va. 2002) (finding *Brindenbaugh* "improperly decided because it does not rely on the established dormant Commerce Clause analysis"); *Dickerson v. Bailey*, 212 F. Supp. 2d 673, 682 (S.D. Tex. 2002) (observing that in its "concentration on Indiana's three-tiered scheme . . . [the court] did not discuss the last forty years of Supreme Court jurisprudence relating to balancing and harmonizing the dormant commerce clause and § 2 of the twenty-first Amendment"), *aff'd*, *Dickerson v. Bailey*, 336 F.3d 388 (5th Cir. 2003) (finding that *Brindenbaugh* was factually distinguishable from that case); *Bainbridge v. Turner*, 311 F.3d 1104, 1114 n.15 (11th Cir. 2002) (commenting that the court "disagree[s] with the analytical framework used in [*Bridenbaugh*]").

For example, *Bridenbaugh* did not involve any out-of-state wineries as plaintiffs, and it thus addressed only whether the Indiana statute discriminated against customers who wanted to have out-of-state wine shipped directly to them. Furthermore, it appears the Indiana statutes differ from the provisions at issue here, as the court found that "Indiana insists that *every* drop of liquor pass through its three-tiered system and be subjected to taxation." *Bridenbaugh*, 227 F.3d at 853. Michigan, on the other hand, effectively exempts in-state wineries from the three-tier system, an exemption it does not extend to out-of-state wineries. Finally, in contrast to this case, the *Bridenbaugh* plaintiffs were "concerned only with direct shipments from out-of-state sellers who lack *and do not want* Indiana permits." *Id.* at 854. By contrast, the plaintiffs in this case are willing to acquire Michigan permits and pay taxes on wines shipped; they simply want to be eligible for such permits on the same basis as in-state wineries. For all of these reasons, we do not find the opinion in *Bridenbaugh* persuasive.

The district court in this case was correct in finding that the Michigan alcohol distribution system discriminates between in-state and out-of-state interests to the extent that in-state wineries may obtain licenses to ship wine directly to consumers, but out-of-state wineries may not and are instead required to go through the more costly three-tier system. What the district court did not do was undertake the necessary analysis that follows from such a finding. Instead, it concluded that Michigan's system "cannot be characterized as 'mere economic protectionism,'" because the system furthers the "core concerns" of the Twenty-first Amendment. The district court's observation that "[t]he Michigan Legislature has chosen this path to ensure the collection of taxes from out-of-state wine manufacturers and to reduce the risk of alcohol falling into the hands of minors" and its conclusion that "the 21st Amendment gives it the power to do so," without more, do not constitute strict scrutiny, as required by Supreme Court precedent. It is not enough that the Michigan Legislature has chosen this particular regulatory scheme to further what are legitimate objectives. The proper inquiry, detailed above, is whether it "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *New Energy Co. of Ind. v. Limbach,* 486 U.S. 269, 278 (1988). We find no evidence on this record that it does.

CONCLUSION

For the reasons set out above, we REVERSE the judgment of the district court granting summary judgment to the defendants and REMAND the case for entry of judgment in favor of the plaintiffs.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 01-2720

FILED
AUG 28 2003
LEONARD GREEN, Clerk

ELEANOR HEALD; RAY HEALD; JOHN ARUNDEL; KAREN BROWN; RICHARD BROWN; BONNIE McMINN; GREGORY STEIN; MICHELLE MORLAN; WILLIAM HORWATH; MARGARET CHRISTINA; ROBERT CHRISTINA; TRISHA HOPKINS; JIM HOPKINS; DOMAINE ALFRED, INC.,
Plaintiffs – Appellants,

v.

JOHN ENGLER, Governor; JENNIFER M. GRANHOLM, Attorney General; JACQUELYN STEWART, Chairperson, Michigan Liquor Control Commission, in their Official Capacities,
Defendants – Appellees,
MICHIGAN WINE & BEER WHOLESALERS ASSOCIATION,
Intervening Defendant – Appellee.

Before: GUY, BOGGS, and DAUGHTREY, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is REVERSED and the case is REMANDED for entry of judgment in favor of the plaintiffs.

ENTERED BY ORDER OF THE COURT

S/S

Leonard Green, Clerk

No. 01-2720

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
NOV 4 2003
LEONARD GREEN, Clerk

ELEANOR HEALD, ET AL.,

Plaintiffs-Appellants,

v. ORDER

JOHN ENGLER, GOVERNOR, ET AL.,

Defendants-Appellees,

MICHIGAN WINE & BEER WHOLESALERS ASSOCIATION,

Intervening-Defendant-Appellee.

BEFORE: BOGGS, Chief Judge; GUY and DAUGHTREY, Circuit Judges.

The court having received two petitions for rehearing en banc, and the petitions having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petitions for rehearing have been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petitions were fully considered upon the original submission and decision of the case. Accordingly, the petitions are denied.

ENTERED BY ORDER OF THE COURT

S/S
Leonard Green, Clerk

Case No: 01-2720

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

FILED
NOV 21 2003
LEONARD GREEN, Clerk

ELEANOR HEALD; RAY HEALD; JOHN ARUNDEL; KAREN BROWN; RICHARD BROWN; BONNIE MCMINN; GREGORY STEIN; MICHELLE MORLAN; WILLIAM HORWATH; MARGARET CHRISTINA; ROBERT CHRISTINA; TRISHA HOPKINS; JIM HOPKINS; DOMAINE ALFRED, INC.

Plaintiffs-Appellants,

v.

JOHN ENGLER, Governor; JENNIFER M. GRANHOLM, Attorney General; JACQUELYN STEWART;

Defendants-Appellees,

MICHIGAN WINE & BEER WHOLESALERS ASSOCIATION,

Intervening-Defendants-Appellees.

BEFORE: BOGGS, Chief Judge; GUY and DAUGHTREY, Circuit Judges.

Upon consideration of the appellee's motion to stay mandate,

It is ORDERED that the mandate be stayed to allow 90 days time to file a petition for a writ of certiorari, and thereafter until the Supreme Court disposes of the case, but shall promptly issue if the petition is not filed within ninety days from the date of final judgment by this court.

ENTERED BY ORDER OF THE COURT

S/S
Leonard Green, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ELEANOR HEALD, et al.,

Plaintiffs,

Civil Action No.
00-CV-71438-DT

vs.

HON. BERNARD A. FRIEDMAN

JOHN ENGLER, et al.,

Defendants,

and

MICHIGAN BEER AND WINE WHOLESALERS ASSOCIATION,

Intervening Defendant.

RECEIVED
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Dept of Attorney General
LCC Division-Lansing

OPINION AND ORDER DENYING DEFENDANTS' MOTION TO DISMISS, DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT, AND GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This matter is presently before the court on cross motions for summary judgment. The issues have been fully briefed and the court has heard oral argument. For the reasons stated below, the court shall grant defendants' motion and deny plaintiffs' motion.

The plaintiffs in this case are Michigan residents who are wine connoisseurs, wine journalists, and wine collectors. One of the

plaintiffs, Domaine Alfred, Inc., is a small California winery that ships its wines to customers in other states. The defendants are Michigan's governor, Michigan's attorney general, and the chair of Michigan's Liquor Control Commission. The Michigan Beer and Wine Wholesalers Association has intervened as a defendant. In addition, amicus briefs have been filed by the Michigan Interfaith Council on Alcohol Problems and by a collection of Michigan public universities, both of which support the defendants' position.

Plaintiffs have brought this action to challenge an aspect of Michigan's alcohol distribution system. Under Michigan's long-established "three-tier system," consumers must purchase alcoholic beverages from licensed retailers; retailers must purchase them from licensed wholesalers; and wholesalers must purchase them from licensed manufacturers. In one form or another, the three-tier distribution system is in place in most states. See *Bainbridge v. Bush,* 148 F. Supp. 2d 1306, 1308 (M.D. Fla. 2001); Vijay Shanker, *Alcohol Direct Shipment Laws*, 85 Va. L. Rev. 353, 355 (1999).

Plaintiffs challenge the provision of Michigan's alcohol distribution system that generally prohibits manufacturers of alcoholic beverages from shipping their products directly to Michigan consumers. Plaintiffs note that Michigan law makes an exception for Michigan wineries, which may ship their wines directly to Michigan consumers. No such exception is made for out-of-state wineries, which are required to sell their wines through Michigan wholesalers.[3] Plaintiffs argue that this

[3]This distinction between in-state and out-of-state wineries is not directly apparent from the statutory framework. However, it can be gleaned from various Michigan Liquor Control Commission regulations, which are codified within the Michigan Administrative Code. R436.1057 states that "[a] person shall not deliver, ship, or transport into this state beer, wine, or spirits without a license authorizing such action, ..." The only applicable license, an "out of state seller of wine licence [sic]," may according to R436.1705(2)(d) be obtained by a "manufacturer which is located outside of this state, but in the United States, and which produces and bottles its own wine." However, under R436.1719(4) the holder of such a license may ship wine "only to a licensed wholesaler at the address of the licensed premises except upon written order of the commission." In answers to interrogatories, a representative of the Michigan Liquor Control Commission indicates that "[a]t present, there is no procedure whereby an out-of-state retailer or winery can obtain a license or approval to deliver wine directly to Michigan residents." See defendant Stewart's answers to interrogatories, Answer 16.

In contrast, the Michigan Liquor Control Commission indicates that the "ability to deliver wine to the consumer is available to winemakers licensed in Michigan, inasmuch as under the provisions of MCL 436.1113(9) these licensees are permitted to sell at retail the wines they manufacture ... A licensed Michigan winemaker may deliver their [sic] own products to customers without an SDM [specially designated merchant] license." *Id.* Answer 8.

statutory scheme discriminates against out-of-state wineries, and interferes with the free flow of commerce, in violation of the dormant Commerce Clause.[4] Plaintiffs allege that this discrimination puts out-of-state wineries at a competitive disadvantage because they must incur the expense of channeling their wines through wholesalers and retailers, whereas in-state wineries may act as retailers and sell directly to Michigan consumers. Plaintiffs contend many small out-of-state wineries, which either cannot afford or choose not to pay this additional expense, are effectively excluded from the Michigan market. This, it is alleged, harms both the out-of-state wineries and the Michigan consumers interested in purchasing their wines. Additionally, plaintiffs Ray and Eleanor Heald allege that their ability to carry out their profession as wine journalists and wine critics is hampered by their inability to obtain many wines produced by out-of-state

[4]Article I § 8 cl. 3 of the United States Constitution grants Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; ..." The Supreme Court "long has recognized that this affirmative grant of authority to Congress also encompasses an implicit or 'dormant' limitation on the authority of the States to enact legislation affecting interstate commerce." *Healy v. The Beer Institute,* 491 U.S. 324, 326 n.1 (1989).

wineries. For relief, they seek a declaratory judgment that it is unconstitutional for Michigan to prohibit out-of-state wineries from shipping wine directly to Michigan residents.

Defendants contend that Michigan's three-tier distribution system, and its different treatment of out-of-state and in-state wineries, are authorized under § 2 of the 21st Amendment.[5] Defendants argue that Michigan has a legitimate interest in ensuring that all wine sales, whether from in-state or out-of-state wineries, is carefully regulated. Defendants assert the present system ensures that all applicable taxes are collected and that minors do not have direct access to alcohol. Defendants further assert that Michigan wineries may act as retailers because they are subjected to extensive licensing requirements which cannot be applied, or practicably enforced, as to out-of-state wineries.

Defendants first argue that plaintiffs' complaint should be dismissed because plaintiffs lack standing to sue. This argument is easily disposed of. Standing is established by a showing of injury in fact, causation and redressability. See *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992). In this case, plaintiffs have established each element. Plaintiffs' inability to obtain, or to sell, the wines they desire is a cognizable injury. The injury is caused by Michigan's prohibition of direct sales by out-of-state wineries to Michigan consumers. And the injury would be redressed by a ruling in plaintiffs' favor. Plaintiffs clearly have standing to assert this claim. See *Bridenbaugh,* 227 F.3d 849-50.

Defendants also argue that the court lacks jurisdiction over this matter under the Tax Injunction Act, 28 U.S.C. § 1341, which

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[5]U.S. Const. Amend. XXI, § 2 states: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

states that "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law ...." This statute "prohibits a federal district court, in most circumstances, from issuing an injunction enjoining the collection of state taxes ... [and] from issuing a declaratory judgment holding state tax laws unconstitutional." *California v. Grace Brethren Church,* 457 U.S. 393, 408 (1982). This statute does not apply in this case. Plaintiffs do not seek a declaration enjoining the collection of any state tax; they seek a declaration that Michigan's direct shipment law is unconstitutional. Plaintiffs have specifically indicated they are willing and able to pay any and all applicable taxes. The motion to dismiss the complaint for lack of subject matter jurisdiction on these grounds must be denied.

While the case law concerning direct shipment laws is sparse, the more persuasive decisions have found such laws to be constitutional.[6] In *House of York, Ltd. v. Ring.,* 322 F. Supp. 530 (S.D.N.Y. 1970), plaintiff was a Delaware beverage distributor that challenged a New York statute prohibiting the direct shipment of alcoholic beverages to New York residents. Among other things, plaintiff argued that the statute violated the Commerce Clause. In rejecting this argument, the court stated:

> A series of decisions by the Supreme Court rendered shortly after the ratification of [the 21st Amendment] made it abundantly clear that the

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[6]The court is aware of three contrary district court decisions. See *Bridenbaugh v. O'Bannon*, 78 F. Supp. 2d 828 (N.D. Ind. 1999), *rev'd Bridenbaugh v. Freeman-Wilson,* 227 F.3d 848 (7th Cir. 2000); *Swedenburg v. Kelly,* 2000 WL 1264285 (S.D.N.Y. 2000) (unpublished decision denying a Rule 12(b)(6) motion to dismiss); and *Dickerson v. Bailey,* 87 F. Supp. 691 (S.D. Tex. 2000) (granting summary judgment for plaintiffs where state statute prohibited direct shipment and personal importation of more than three gallons of wine).

> states were considered to have acquired plenary authority to deal with intoxicating beverages after importation ... [W]hile it is clear that the twenty-first amendment does not abrogate the Commerce Clause, the states have wide latitude in regulating liquors coming into, rather than through, the state, and such latitude encompasses the statute now before us.

Id. at 533, 535.

In *Bainbridge v. Bush*, 148 F. Supp. 2d 1306 (M.D. Fla. 2001), plaintiffs challenged Florida's direct shipment law. In all relevant respects, the statutory scheme at issue in *Bainbridge* is identical to Michigan's. Just as in Michigan, the Florida statute permits a Florida winery to obtain a vendor's license and to sell its products directly to Florida residents; however, such a license is not available to out-of-state wineries, which must incur the additional expense of selling their products through the three-tier distribution system. The court noted that this scheme "has the practical effect of preventing many small wineries from selling their wine in Florida ... because it is not cost-effective for the smaller out-of-state wineries to acquire a Florida wholesaler." *Id.* at 1311 n.7. The court found that the Florida statute violated the Commerce Clause because it "directly discriminates against out-of-state retailers and nondiscriminatory alternatives are available to serve the legitimate state interests ...." *Id.* at 1312.

Nonetheless, the court rejected plaintiffs' constitutional challenge and found the statute to be valid under § 2 of the 21st Amendment. The court noted that in a series of decisions the Supreme Court has indicated that under this amendment states have "virtually complete control" over the importation and distribution of alcohol; that state liquor statutes are presumptively valid; and that the three-tier distribution system is "unquestionably legitimate." *Id.* at 1310-1312, quoting *North*

Dakota v. United States, 495 U.S. 423, 431-32 (1990). While state liquor control laws are not immune from scrutiny, they generally are upheld so long as they implicate "'core concerns' of the twenty-first amendment, including temperance, raising revenue and 'ensuring orderly market conditions.'" *Id.* at 1313, quoting *North Dakota*, 495 U.S. at 432. The court found that the Florida statute met this test, as it sought to address "a serious threat to the public health, safety, and welfare; to state revenue collections; and to the economy of the state." *Id.* at 1308, quoting Fla. Stat. § 561.545 (legislative findings). The court concluded by stating:

> [T]he discriminatory nature of Florida's statutory scheme, when considered from the perspective of out-of-state wineries, violates the dormant commerce clause. However, because the Florida statutory scheme implicates the "core concerns" of the Twenty-First Amendment, it is a valid exercise of Florida's power even as applied to out-of-state wineries. ... In this regard, the numerous interests promoted by the Florida statutory scheme, including temperance, revenue protection, and the reduction of diversion and bootlegging, outweigh the minimal burden placed on interstate commerce.

Id. at 1315.

In *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000), the Seventh Circuit reversed a district court decision finding an Indiana direct shipment statute unconstitutional. In *Bridenbaugh*, as in the present case, plaintiffs were wine collectors and connoisseurs, who complained that the direct shipment statute prevented them from obtaining wine from small out-of-state wineries which could not afford to, or chose not to, sell their products through the three-tier distribution system. Plaintiff Bridenbaugh, like the Healds in the present

case, also alleged that the direct shipment statute interfered with his ability to engage in his profession as a wine critic.

The district court found that the statute was unconstitutional because it violated the Commerce Clause by discriminating against out-of-state wineries in favor of in-state wineries. The district court further found that the statute did not promote temperance and that, therefore, the statute was not a proper exercise of power under the 21st Amendment. See *Id.* at 831 & 832 n.4 ("[T]emperance is the core purpose of the Twenty-First Amendment"; "[t]emperance is not the issue in the case now before this Court").

On appeal, the Seventh Circuit noted that the Indiana statute would be invalid under the Commerce Clause if it were directed at any consumer product other than alcoholic beverages. See *Bridenbaugh v. Freeman-Wilson,* 227 F.3d 848, 851 (7th Cir. 2000). The court also agreed that the statute "is hard to justify as a temperance measure." *Id.* Nonetheless, the appeals court reversed the judgment of the district court because the Indiana direct shipment law was a valid exercise of state authority under § 2 of the 21st Amendment. The court stated:

> Indiana Code § 7.1-5-11-1.5(a), like the statute in Bowman, regulates importation. And the shipments it regulates, direct shipments to consumers, are precisely the sort that prompted the Webb-Kenyon Act, the forefather of § 2. Section 2 thus authorizes I.C. § 7.1-5-11-1.5(a) unless the state has used its power to impose a discriminatory condition on importation, one that favors Indiana sources of alcoholic beverages over sources in other states, as Hawaii did in Bacchus. Plaintiffs contend that § 7.1-5-11-1.5(a) discriminates in this fashion, but we do not see how. Indiana insists that every drop of liquor pass

> through its three-tiered system and be subjected to taxation. Wine originating in California, France, Australia, or Indiana passes through the same three tiers and is subjected to the same taxes. Where's the functional discrimination?

Id. at 853. The court acknowledged that Indiana wineries are permitted to ship their wines directly to Indiana consumers, whereas out-of-state wineries are required to sell their wines through licensed wholesalers and retailers. See *Id.* at 851. However, the court rejected plaintiffs' contention that this scheme discriminates unfairly against out-of-state wineries. Noting that the 21st Amendment "empowers Indiana to control alcohol in ways that it cannot control cheese," the court found that the direct shipment law "channels [out-of-state] sales through Indiana permit-holders, enabling Indiana to collect its excise tax equally from in-state and out-of-state sellers. As the history of the twenty-first amendment confirms, this is precisely what § 2 is for." *Id.* at 851, 854.

The court believes that the decisions in *House of York*, *Bridenbaugh* and *Bainbridge* correctly concluded that direct shipment laws are a permissible exercise of state power under § 2 of the 21st Amendment. While the dormant Commerce Clause would prohibit states from burdening interstate commerce by applying such laws to any other products, the 21st Amendment directly authorizes the states "to control alcohol in ways that it cannot control cheese." *Bridenbaugh,* 227 F.3d at 851. The Supreme Court has specifically upheld the three-tier distribution system and has stated more than once that "within the area of its jurisdiction, the State has 'virtually complete control' over the importation and sale of liquor and the structure of the liquor distribution system." *North Dakota v. United States,* 495 U.S. 423, 431 (1990), citing *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980). See also *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 584-85 (1986)

(noting that while the 21st Amendment does not authorize a state to regulate liquor sales in other states, the amendment does give states "wide latitude to regulate the importation and distribution of liquor within their territories"); *Capital Cities Cable, Inc. v. Crisp,* 467 U.S. 691, 712 (1984) (noting that § 2 "reserves to the States power to impose burdens on interstate commerce in intoxicating liquor that, absent the Amendment, would clearly be invalid under the Commerce Clause"). The control is "virtually complete," and not "complete," because a state's actions under the 21st Amendment must further "core" concerns of that Amendment -- namely, "the interest of promoting temperance, ensuring orderly market conditions, and raising revenue." *North Dakota,* 495 U.S. at 432. These interests are not furthered -- and the 21st Amendment will not deflect a Commerce Clause challenge -- when, for example, a state exempts locally produced alcoholic beverages from a generally applicable liquor excise tax, thereby engaging in "mere economic protectionism." *Bacchus Imports, Ltd. v. Dias,* 468 U.S. 263 (1984). The Supreme Court has invalidated other state statutes as well, when the burden on interstate commerce is not justified by "core" 21st Amendment concerns. See *Healy v. The Beer Institute*, 491 U.S. 324 (1989) (invalidating price affirmation statute); *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573 (1986) (same); *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964) (invalidating prohibition of liquor sales to departing international airline travelers).

The court is persuaded that Michigan's direct shipment law is a permitted exercise of state power under § 2 of the 21st Amendment. The measure cannot be characterized as "mere economic protectionism." The direct shipment law is one provision of a comprehensive system that regulates the flow of all alcoholic beverages into and within the State of Michigan. Out-of-state wineries are not prohibited from selling their products in Michigan; they simply must do so in a manner prescribed by Michigan's statutory scheme -- namely, by going

through a licensed wholesaler. The Michigan Legislature has chosen this path to ensure the collection of taxes from out-of-state wine manufacturers and to reduce the risk of alcohol falling into the hands of minors. The 21st Amendment gives it the power to do so.

For the reasons stated above,

IT IS ORDERED that plaintiffs' motion for summary judgment is denied.

IT IS FURTHER ORDERED that plaintiffs' requests for injunctive and declaratory relief are denied.

IT IS FURTHER ORDERED that defendants' motions to dismiss or for summary judgment due to lack of standing or for lack of subject matter jurisdiction are denied.

IT IS FURTHER ORDERED that defendants' motions for summary judgment on the merits are granted.

IT IS FURTHER ORDERED that the remaining motions are denied as moot.

S/S
BERNARD A. FRIEDMAN
UNITED STATES DISTRICT JUDGE

Dated: 28 SEP 2001
Detroit, Michigan

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ELEANOR HEALD, et al.,

Plaintiffs, Civil Action No.
00-CV-71438-DT

vs. HON. BERNARD A. FRIEDMAN

JOHN ENGLER, et al.,

Defendants,

and

MICHIGAN BEER AND WINE
WHOLESALERS ASSOCIATION,
_____/

JUDGMENT

The court has granted defendants' motion for summary judgment and denied plaintiffs' motion for summary judgment. Accordingly,

IT IS ORDERED AND ADJUDGED that judgment be and is hereby granted for defendants and against plaintiffs. Costs to be permitted in accordance with law.

DAVID J. WEAVER
CLERK OF THE COURT

By: S/S
Deputy Clerk

Approved: S/S
BERNARD A. FRIEDMAN
U.S. DISTRICT JUDGE

28 SEP 2001

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ELEANOR HEALD, et al.,

Plaintiffs,

Civil Action No.
00-CV-71438-DT

vs.

HON. BERNARD A. FRIEDMAN

JOHN ENGLER, et al.,

Defendants,

and

MICHIGAN BEER AND WINE
WHOLESALERS ASSOCIATION,

Intervening Defendant.
_____/

ORDER DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION

This matter is presently before the court on plaintiffs' motion for reconsideration of the court's opinion and order granting summary judgment for defendants. The motion is denied because plaintiffs have not "demonstrate[d] a palpable defect by which the court and the parties have been misled [and] . . . that correcting the defect will result in a different disposition of the case." E.D. Mich. LR 7.1(g)(3).

The bottom line in this case is that the 21st Amendment authorizes states to regulate the flow of alcohol within their borders. The three-tier distribution system is a proper exercise

of that constitutional authority, despite the fact that such a system places a minor burden on interstate commerce. The court did not address the parties' cross motions to strike various affidavits and other evidence because the court did not consider the challenged evidence in deciding the summary judgment motions. In effect, the court denied the cross motions to strike as moot. This case turns on largely legal questions, not factual disputes. Accordingly,

IT IS ORDERED that plaintiffs' motion for reconsideration is denied.

S/S
BERNARD A. FRIEDMAN
UNITED STATES DISTRICT JUDGE

Dated: NOV 05 2001
Detroit, Michigan

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ELEANOR HEALD, et al.,

Plaintiffs,

Civil Action No.
00-CV-71438-DT

vs.

HON. BERNARD A. FRIEDMAN

JOHN ENGLER, et al.,

Defendants,

and

MICHIGAN BEER AND WINE
WHOLESALERS ASSOCIATION,

Intervening Defendant.
_____/

JUDGMENT

In accordance with the Sixth Circuit's order of remand dated August 28, 2003,

IT IS ORDERED AND ADJUDGED that judgment be and is hereby granted for plaintiffs and against defendants. Costs to be permitted in accordance with law.

DAVID J. WEAVER
CLERK OF COURT

By: S/S
Deputy Clerk

Approved:_____
BERNARD A. FRIEDMAN
U.S. DISTRICT JUDGE

SEP 05 2003

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ELEANOR HEALD, et al.,

Plaintiffs, Civil Action No.
00-CV-71438-DT

vs.

HON. BERNARD A. FRIEDMAN

JOHN ENGLER, et al.,

Defendants,

and

MICHIGAN BEER AND WINE
WHOLESALERS ASSOCIATION,

Intervening Defendant.
_____/

ORDER GRANTING DEFENDANT'S
MOTION FOR RELIEF FROM JUDGMENT

Defendant has filed a motion, in which intervening defendant joins, requesting that the court vacate its September 5, 2003, judgment. Defendant correctly notes that the judgment was filed before the court of appeals' mandate was issued. Accordingly,

IT IS ORDERED that defendant's motion for relief from judgment is granted, and the court's September 5, 2003, judgment is vacated.

S/S
BERNARD A. FRIEDMAN
UNITED STATES DISTRICT JUDGE

Dated: Sep 24 2003
Detroit, Michigan

The **Webb-Kenyon Act** provides:

§ 122. Shipments into States for possession or sale in violation of State law

The shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited.

27 USC 122.

436.1109 Definitions; M to O.

Sec. 109. (1) "Manufacturer" means a person engaged in the manufacture of alcoholic liquor, including, but not limited to, a distiller, a rectifier, a wine maker, and a brewer.

(2) "Micro brewer" means a brewer that produces in total less than 30,000 barrels of beer per year and that may sell the beer produced to consumers at the licensed brewery premises for consumption on or off the licensed brewery premises. In determining the 30,000-barrel threshold, all brands and labels of a brewer, whether brewed in this state or outside this state, shall be combined and all facilities for the production of beer that are owned or controlled by the same person shall be treated as a single facility.

(3) "Minor" means a person less than 21 years of age.

(4) "Mixed spirit drink" means a drink produced and packaged or sold by a mixed spirit drink manufacturer or an outstate seller of mixed spirit drink which contains 10% or less alcohol by volume consisting of distilled spirits mixed with nonalcoholic beverages or flavoring or coloring materials and which may also contain 1 or more of the following:

(a) Water.

(b) Fruit juices.

(c) Fruit adjuncts.

(d) Sugar.

(e) Carbon dioxide.

(f) Preservatives.

(5) "Mixed spirit drink manufacturer" means any person licensed under this act to manufacture mixed spirit drink in this state and to sell mixed spirit drink to a wholesaler. For purposes of rules promulgated by the commission, a mixed spirit drink manufacturer shall be treated as a wine manufacturer but is subject to the rules applicable to spirits for purposes of manufacturing and labeling.

(6) "Mixed wine drink" means a drink or similar product marketed as a wine cooler and containing less than 7% alcohol by volume, consisting of wine and plain, sparkling, or

carbonated water, and containing any 1 or more of the following:

(a) Nonalcoholic beverages.

(b) Flavoring.

(c) Coloring materials.

(d) Fruit juices.

(e) Fruit adjuncts.

(f) Sugar.

(g) Carbon dioxide.

(h) Preservatives.

(7) "Outstate seller of beer" means a person licensed by the commission to sell beer which has not been manufactured in this state to a wholesaler in this state in accordance with rules promulgated by the commission.

(8) "Outstate seller of mixed spirit drink" means a person licensed by the commission to sell mixed spirit drink which has not been manufactured in this state to a wholesaler in this state in accordance with rules promulgated by the commission. For purposes of rules promulgated by the commission, an outstate seller of mixed spirit drink shall be treated as an outstate seller of wine but is subject to the rules applicable to spirits for purposes of manufacturing and labeling.

(9) "Outstate seller of wine" means a person licensed by the commission to sell wine which has not been manufactured in this state to a wholesaler in this state in accordance with rules promulgated by the commission and to sell sacramental wine as provided in section 301.

436.1111 Definitions; P to S.

Sec. 111. (1) "Person" means an individual, firm, partnership, limited partnership, association, limited liability company, or corporation.

(2) "Primary source of supply" means, in the case of domestic spirits, the distiller, producer, owner of the commodity at the time it becomes a marketable product, or bottler, or the exclusive agent of any such person and, in the case of spirits imported into the United States, either the foreign distiller, producer, owner of the bottler, or the prime importer for, or the exclusive agent in the United States of, the foreign distiller, producer, owner, or the bottler.

(3) "Professional account" means an account established for a person by a class C licensee or tavern licensee whose major business is the sale of food, by which the licensee extends credit to the person for not more than 30 days.

(4) "Residence" means the premises in which a person resides permanently.

(5) "Retailer" means a person licensed by the commission who sells to the consumer in accordance with rules promulgated by the commission.

(6) "Sacramental wine" means wine containing not more than 24% of alcohol by volume which is used for sacramental purposes.

(7) "Sale" includes the exchange, barter, traffic, furnishing, or giving away of alcoholic liquor. In the case of a sale in which a shipment or delivery of alcoholic liquor is made by a common or other carrier, the sale of the alcoholic liquor is considered to be made in the county within which the delivery of the alcoholic liquor is made by that carrier to the consignee or his or her agent or employee, and venue for the prosecution for that sale may be in the county or city where the seller resides or from which the shipment is made or at the place of delivery.

(8) "School" includes buildings used for school purposes to provide instruction to children in grades kindergarten through 12, when that instruction is provided by a

public, private, denominational, or parochial school, except those buildings used primarily for adult education or college extension courses. School does not include a proprietary trade or occupational school.

(9) "Small wine maker" means a wine maker manufacturing or bottling not more than 50,000 gallons of wine in 1 calendar year.

(10) "Special license" means a contract between the commission and the special licensee granting authority to that licensee to sell beer, wine, mixed spirit drink, or spirits. The license shall be granted only to such persons and such organization and for such period of time as the commission shall determine so long as the person or organization is able to demonstrate an existence separate from an affiliated umbrella organization. If such an existence is demonstrated, the commission shall not deny a special license solely by the applicant's affiliation with an organization that is also eligible for a special license.

(11) "Specially designated distributor" means a person engaged in an established business licensed by the commission to distribute spirits and mixed spirit drink in the original package for the commission for consumption off the premises.

(12) "Specially designated merchant" means a person to whom the commission grants a license to sell beer or wine, or both, at retail for consumption off the licensed premises.

(13) "Spirits" means a beverage that contains alcohol obtained by distillation, mixed with potable water or other substances, or both, in solution, and includes wine containing an alcoholic content of more than 21% by volume, except sacramental wine and mixed spirit drink.

(14) "State liquor store" means a store established by the commission under this act for the sale of spirits in the original package for consumption off the premises.

(15) "Supplier of spirits" means a vendor of spirits, a manufacturer of spirits, or a primary source of supply.

436.1113 Definitions; T to W.

Sec. 113. (1) "Tavern" means any place licensed to sell at retail beer and wine for consumption on the premises only.

(2) "Vehicle" means any means of transportation by land, by water, or by air.

(3) "Vendor" means a person licensed by the commission to sell alcoholic liquor.

(4) "Vendor of spirits" means a person selling spirits to the commission.

(5) "Warehouse" means a premises or place primarily constructed, used, or provided with facilities for the storage in transit or other temporary storage of perishable goods or for the conduct of a warehousing business, or for both.

(6) "Warehouser" means a licensee authorized by the commission to store alcoholic beverages, but prohibited from making sales or deliveries to retailers unless the licensee is also the holder of a wholesaler or manufacturer license issued by the commission.

(7) "Wholesaler" means a person who sells beer, wine, or mixed spirit drink only to retailers or other licensees, and who sells sacramental wine as provided in section 301.

(8) "Wine" means the product made by the normal alcoholic fermentation of the juice of sound, ripe grapes, or any other fruit with the usual cellar treatment, and containing not more than 21% of alcohol by volume, including fermented fruit juices other than grapes and mixed wine drinks.

(9) "Wine maker" means any person licensed by the commission to manufacture wine and sell, at wholesale or retail, wine manufactured by that person.

436.1203 Sale, delivery, or importation of alcoholic liquor; original purchase and importation into state of spirits for sale, use, storage, or distribution; requirements; exceptions.

Sec. 203. (1) Except as provided in this section and section 301, a sale, delivery, or importation of alcoholic liquor, including alcoholic liquor for personal use, shall not be made

in this state unless the sale, delivery, or importation is made by the commission, the commission's authorized agent or distributor, an authorized distribution agent approved by order of the commission, a person licensed by the commission, or by prior written order of the commission.

(2) For purposes of subsection (1), the sale, delivery, or importation of alcoholic liquor includes, but is not limited to, the sale, delivery, or importation of alcoholic liquor transacted or caused to be transacted by means of any mail order, internet, telephone, computer, device, or other electronic means. Subject to subsection (3), if a retail sale, delivery, or importation of alcoholic liquor occurs by any such means, the retailer must comply with all of the following:

(a) Be appropriately licensed under the laws of this state.

(b) Pay any applicable taxes to the commission.

(c) Comply with all prohibitions of the laws of this state including, but not limited to, sales to minors.

(d) Verify the age of the individual placing the order by obtaining from him or her an affirmation that he or she is of legal age to purchase alcoholic liquor. The person receiving and accepting the order shall record the name, address, date of birth, and telephone number of the person placing the order on the order form or other verifiable record of a type and generated in a manner approved by the commission.

(e) Upon request of the commission, make available to the commission any document used to verify the age of the individual ordering the alcoholic liquor from the retail seller.

(f) Stamp, print, or label on the outside of the shipping container language that clearly establishes in a prominent fashion that the package contains alcoholic liquor and that the recipient at the time of the delivery is required to provide identification verifying his or her age along with a signature.

(g) Place a label on the top panel of the shipping container containing the name and address of the individual placing the order and the name of the designated recipient, if any.

(3) Notwithstanding subsection (2), in the case of a retail sale, delivery, or importation of alcoholic liquor occurring by any means described in subsection (2), a person taking the order on behalf of the retailer must comply with subsection (2)(c) through (g).

(4) The person who delivers the alcoholic liquor shall verify that the individual accepting delivery is of legal age and is either the individual who placed the order or the designated recipient residing at the same address or is otherwise authorized through a rule promulgated under this act by the commission to receive alcoholic liquor under this section. If the delivery person, after a diligent inquiry, determines that the purchaser or designated recipient is not of legal age, the delivery person shall return the alcoholic liquor to the retailer. A delivery person who returns alcoholic liquor to the retailer due to inability to obtain the purchaser's or designated recipient's legal age is not liable for any damages suffered by the purchaser or retailer.

(5) All spirits for sale, use, storage, or distribution in this state, shall originally be purchased by and imported into the state by the commission, or by prior written authority of the commission.

(6) This section does not apply in the case of an alcoholic liquor brought into this state for personal or household use in an amount permitted by federal law by a person of legal age to purchase alcoholic liquor at the time of reentry into this state from without the territorial limits of the United States if the person has been outside the territorial limits of the United States for more than 48 hours and has not brought alcoholic liquor into the United States during the preceding 30 days.

(7) A person who is of legal age to purchase alcoholic liquor may do either of the following in relation to alcoholic liquor that contains less than 21% alcohol by volume.

(a) Personally transport from another state, once in a 24-hour period, not more than 312 ounces of alcoholic liquor for that person's personal use, notwithstanding subsection (1).

(b) Ship or import from another state alcoholic liquor for that person's personal use so long as that personal importation is done in compliance with subsection (1).

(8) As used in this section:

(a) "Computer" means any connected, directly interoperable or interactive device, equipment, or facility that uses a computer program or other instructions to perform specific operations including logical, arithmetic, or memory functions with or on computer data or a computer program and that can store, retrieve, alter, or communicate the results of the operations to a person, computer program, computer, computer system, or computer network.

(b) "Computer network" means the interconnection of hardwire or wireless communication lines with a computer through remote terminals, or a complex consisting of 2 or more interconnected computers.

(c) "Computer program" means a series of internal or external instructions communicated in a form acceptable to a computer that directs the functioning of a computer, computer system, or computer network in a manner designed to provide or produce products or results from the computer, computer system, or computer network.

(d) "Computer system" means a set of related, connected or unconnected, computer equipment, devices, software, or hardware.

(e) "Device" includes, but is not limited to, an electronic, magnetic, electrochemical, biochemical, hydraulic, optical, or organic object that performs input, output, or storage functions by the manipulation of electronic, magnetic, or other impulses.

(f) "Diligent inquiry" means a diligent good faith effort to determine the age of a person, which includes at least an examination of an official Michigan operator's or chauffeur's license, an official Michigan personal identification card, or any other bona fide picture identification which establishes the identify and age of the person.

436.1537 Classes of vendors permitted to sell alcoholic liquors at retail; sale of wine by wine maker; wine tastings.

Sec. 537. (1) The following classes of vendors may sell alcoholic liquors at retail as provided in this section:

(a) Taverns where beer and wine may be sold for consumption on the premises only.

(b) Class C license where beer, wine, mixed spirit drink, and spirits may be sold for consumption on the premises.

(c) Clubs where beer, wine, mixed spirit drink, and spirits may be sold for consumption on the premises only to bona fide members where consumption is limited to these members and their bona fide guests, who have attained the age of 21 years.

(d) Hotels of class A where beer and wine may be sold for consumption on the premises and in the rooms of bona fide registered guests. Hotels of class B where beer, wine, mixed spirit drink, and spirits may be sold for consumption on the premises and in the rooms of bona fide registered guests.

(e) Specially designated merchants, where beer and wine may be sold for consumption off the premises only.

(f) Specially designated distributors where spirits and mixed spirit drink may be sold for consumption off the premises only.

(g) Special licenses where beer and wine or beer, wine, mixed spirit drink, and spirits may be sold for consumption on the premises only.

(h) Dining cars or other railroad or Pullman cars, watercraft, or aircraft, where alcoholic liquor may be sold for consumption on the premises only, subject to rules promulgated by the commission.

(i) Brewpubs where beer manufactured on the premises by the licensee may be sold for consumption on or off the premises by any of the following licensees:

(i) Class C.

(ii) Tavern.

(iii) Class A hotel.

(iv) Class B hotel.

(j) Micro brewers where beer produced by the micro brewer may be sold to a consumer for consumption on or off the brewery premises.

(k) Class G-1 license where beer, wine, mixed spirit drink, and spirits may be sold for consumption on the premises only to members required to pay an annual membership fee and consumption is limited to these members and their bona fide guests.

(l) Class G-2 license where beer and wine may be sold for consumption on the premises only to members required to pay an annual membership fee and consumption is limited to these members and their bona fide guests.

(2) A wine maker may sell wine made by that wine maker in a restaurant for consumption on or off the premises if the restaurant is owned by the wine maker or operated by another person under an agreement approved by the commission and located on the premises where the wine maker is licensed.

(3) A wine maker, with the prior written approval of the commission, may conduct wine tastings of wines made by that wine maker and may sell the wine made by that wine maker for consumption off the premises at a location other than the premises where the wine maker is licensed to manufacture wine, under the following conditions:

(a) The premises upon which the wine tasting occurs conforms to local and state sanitation requirements.

(b) Payment of a $100.00 fee per location is made to the commission.

(c) The wine tasting locations shall be considered licensed premises.

(d) Wine tasting does not take place between the hours of 2 a.m. and 7 a.m. Monday through Saturday, or between 2 a.m. and 12 noon on Sunday.

(e) The premises and the licensee comply with and are subject to all applicable rules promulgated by the commission.

436.1603 Interest in business of other vendor prohibited; placing certain stock in portfolio under arrangement of trust agreement; issuance and sale of participating shares within state prohibited; sale of brandy by manufacturer; conditions; interest of brewpub in other locations.

Sec. 603. (1) Except as provided in subsection (6) and section 605, a manufacturer, mixed spirit drink manufacturer, warehouser, wholesaler, outstate seller of beer, outstate seller of wine, outstate seller of mixed spirit drink, or vendor of spirits shall not have any financial interest, directly or indirectly, in the establishment, maintenance, operation, or promotion of the business of any other vendor.

(2) Except as provided in subsection (6) and section 605, a manufacturer, mixed spirit drink manufacturer, warehouser, wholesaler, outstate seller of beer, outstate seller of wine, outstate seller of mixed spirit drink, or vendor of spirits or a stockholder of a manufacturer, mixed spirit drink manufacturer, warehouser, wholesaler, outstate seller of beer, outstate seller of wine, outstate seller of mixed spirit drink, or vendor of spirits shall not have an interest by ownership in fee, leasehold, mortgage, or otherwise, directly or indirectly, in the establishment, maintenance, operation, or promotion of the business of any other vendor.

(3) Except as provided in subsection (6) and section 605, a manufacturer, mixed spirit drink manufacturer, warehouser, wholesaler, outstate seller of beer, outstate seller of wine, outstate seller of mixed spirit drink, or vendor of spirits shall not have an interest directly or indirectly by interlocking directors in a corporation or by interlocking stock ownership in a corporation in the establishment, maintenance, operation, or promotion of the business of any other vendor.

(4) Except as provided in subsection (6) and section 605, a person shall not buy the stocks of a manufacturer, mixed spirit drink manufacturer, warehouser, wholesaler, outstate seller of beer, outstate seller of wine, outstate seller of mixed spirit drink, or vendor of spirits and place the stock in any

portfolio under an arrangement, written trust agreement, or form of investment trust agreement and issue participating shares based upon the portfolio, trust agreement, or investment trust agreement, and sell the participating shares within this state.

(5) The commission may approve a brandy manufacturer to sell brandy made by that brandy manufacturer in a restaurant for consumption on or off the premises if the restaurant is owned by the brandy manufacturer or operated by another person under an agreement approved by the commission and is located on the premises where the brandy manufacturer is licensed. Brandy sold for consumption off the premises under this subsection shall be sold at the uniform price established by the commission.

(6) A brewpub may have an interest in up to 2 other brewpubs so long as the combined production of all the locations in which the brewpub has an interest does not exceed 5,000 barrels of beer per calendar year.

436.1605 Acquisition, development, sale, lease, financing, maintenance, operation, or promotion by brewer of real property occupied or to be occupied by another vendor; conditions; denial or approval of arrangement or contract; review; denial, revocation, or suspension of license; wholesaler as party to arrangement or contract prohibited; acquisition, development, sale, lease, financing, maintenance, operation, or promotion of condominium project or unit; exception.

Sec. 605. (1) A brewer, or the parent company, a subsidiary or an affiliate of a brewer which parent company, subsidiary, or affiliate is located in this state may acquire, develop, sell, lease, finance, maintain, operate, or promote real property occupied or to be occupied by another vendor, except a wholesaler, if all of the following exist:

(a) The brewer has received written approval of the commission before entering into any arrangement or contract between the parties regarding the real property.

(b) The legislative body of the city, village, or township where the property is located certifies to the commission that the real property is in an urban, commercial, or community redevelopment area and is designated as such by a state or federal agency.

(c) Any arrangement or contract entered into between the brewer, its parent company, subsidiary, or affiliate and another vendor shall not directly or indirectly influence or control the brand of alcoholic liquor sold or to be sold by the vendor and shall only be concerned with real property.

(2) The commission may deny or approve an arrangement or contract to be entered into under this section. In denying or approving an arrangement or contract, the commission shall consider all of the following:

(a) That the arrangement or contract to be entered into is concerned only with real property.

(b) That the certification required under subsection (1)(b) has been received by the commission.

(c) That the arrangement or contract does not violate this act or the rules promulgated under this act.

(3) The commission may review any arrangement or contract under this section at the time that 1 of the parties to the arrangement or contract applies for or renews a license. The commission may deny, revoke, or suspend the license of a party to the arrangement or contract if the commission finds that the party to the arrangement or contract has violated this act or the rules promulgated under this act.

(4) Except as otherwise provided in subsection (5), a wholesaler shall not be a party to, directly or indirectly, an arrangement or contract under this section.

(5) A manufacturer, mixed spirit drink manufacturer, warehouser, wholesaler, authorized distribution agent, outstate seller of beer, outstate seller of wine, outstate seller of mixed spirit drink, or vendor of spirits may acquire, develop, sell, lease, finance, maintain, operate, or promote a condominium project or own a condominium unit as its sole property, under the condominium act, 1978 PA 59, MCL 559.101 to 559.275,

if that condominium unit is not the licensed premises owned separately by a retailer and if all of the following apply:

(a) Condominium assessments in the condominium project are based on the proportional area each condominium unit has to the total area.

(b) A condominium unit operating as a licensed premises operates under a separate name from the condominium project except that cooperative advertising shall be permitted among owners of condominium units for the purpose of promoting the condominium project if the name of a brand or brands of an alcoholic liquor is not mentioned in the advertising.

(c) Ownership of a condominium unit and participation in a condominium association under this section is not considered a financial interest, interest by ownership, or interest by interlocking directors on stock ownership prohibited by section 603.

(d) A retailer separately owning a separate condominium unit as sole property does not directly purchase alcoholic liquor from the manufacturer, warehouser, wholesaler, outstate seller of mixed spirit drink, or vendor of spirits who owns, leases, maintains, finances, or operates the condominium project.

(e) A wholesaler who has a direct or indirect interest in a condominium unit in which a retailer is located does not sell alcoholic liquor to any licensed retail business in which that retailer, or any person having an ownership interest in that retailer, has an ownership interest; and, a retail licensed business in which that retailer, or any person having an ownership interest in that retailer, has an ownership interest does not purchase alcoholic liquor from a wholesaler who has a direct or indirect interest in a condominium or condominium unit in which that retailer is located.

(f) A retailer acquiring a separate condominium unit as sole property pays the fair market value for the unit.

(6) Subsection (5) does not apply to a manufacturer, mixed spirit drink manufacturer, warehouser, wholesaler,

authorized distribution agent, outstate seller of beer, outstate seller of wine, outstate seller of mixed spirit drink, or vendor of spirits with a direct or indirect interest in a license under the Michigan gaming control and revenue act, the Initiated Law of 1996, MCL 432.201 to 432.216. Subsection (5) does not prohibit a direct physical connection between a condominium unit which is the licensed premises and a condominium unit which is not the licensed premises.

436.1607 Eligibility for license as specially designated merchant or specially designated distributor; prohibitions; brewer as specially designated merchant; brewery hospitality room; sales or deliveries by wholesaler.

Sec. 607. (1) Except as provided in section 537(2), a warehouser, mixed spirit drink manufacturer, wholesaler, outstate seller of beer, outstate seller of wine, outstate seller of mixed spirit drink, or vendor of spirits shall not be licensed as a specially designated merchant or a specially designated distributor or permitted to sell or deliver to the consumer any quantity of alcoholic liquor at retail.

(2) A specially designated distributor or specially designated merchant or any other retailer shall not hold a mixed spirit drink manufacturer, wholesale, warehouse, outstate seller of beer, outstate seller of mixed spirit drink, or outstate seller of wine license.

(3) A brewer, warehouser, or wholesaler shall not be licensed as a specially designated merchant, except for brewers who manufacture less than 200,000 barrels of beer per year. This subsection shall not affect the operation of a brewery hospitality room.

(4) A wholesaler may sell or deliver beer and alcoholic liquor to hospitals, military establishments, governments of federal Indian reservations, and churches requiring sacramental wines and may sell to the wholesaler's own employees to a limit of 2 cases of 24 12-ounce units or its equivalent of malt beverage per week, or 1 case of 12 1-liter units or its equivalent of wine or mixed spirit drink per week.

436.1701 Selling or furnishing alcoholic liquor to person less than 21 years of age; failure to make diligent inquiry; misdemeanor; signs; consumption of alcoholic liquor as cause of death or injury; felony; enforcement against licensee; consent of parent or guardian in undercover operation; defense in action for violation; report; definitions.

Sec. 701. (1) Alcoholic liquor shall not be sold or furnished to a minor. Except as otherwise provided in subsection (2) and subject to subsections (4), (5), and (6), a person who knowingly sells or furnishes alcoholic liquor to a minor, or who fails to make diligent inquiry as to whether the person is a minor, is guilty of a misdemeanor. A retail licensee or a retail licensee's clerk, agent, or employee who violates this subsection shall be punished in the manner provided for licensees in section 909, except that if the violation is the result of an undercover operation in which the minor received alcoholic liquor under the direction of the state police, the commission, or a local police agency as part of an enforcement action, the retail licensee's clerk, agent, or employee is responsible for a state civil infraction and may be ordered to pay a civil fine of not more than $100.00. Except as otherwise provided in subsection (2), a person who is not a retail licensee or a retail licensee's clerk, agent, or employee and who violates this subsection is guilty of a misdemeanor punishable by a fine of not more than $1,000.00 and imprisonment for not more than 60 days for a first offense, a fine of not more than $2,500.00 and imprisonment for not more than 90 days for a second or subsequent offense, and may be ordered to perform community service. A suitable sign describing the content of this section and the penalties for its violation shall be posted in a conspicuous place in each room where alcoholic liquor is sold. The signs shall be approved and furnished by the commission.

(2) A person who is not a retail licensee or the retail licensee's clerk, agent, or employee and who violates

subsection (1) is guilty of a felony, punishable by imprisonment for not more than 10 years or a fine of not more than $5,000.00, or both, if the subsequent consumption of the alcoholic liquor by the minor is a direct and substantial cause of that person's death or an accidental injury that causes that person's death.

(3) If a violation occurs in an establishment that is licensed by the commission for consumption of alcoholic liquor on the licensed premises, a person who is a licensee or the clerk, agent, or employee of a licensee shall not be charged with a violation of subsection (1) or section 801(2) unless the licensee or the clerk, agent, or employee of the licensee knew or should have reasonably known with the exercise of due diligence that a person less than 21 years of age possessed or consumed alcoholic liquor on the licensed premises and the licensee or clerk, agent, or employee of the licensee failed to take immediate corrective action.

(4) If the enforcing agency involved in the violation is the state police or a local police agency, a licensee shall not be charged with a violation of subsection (1) or section 801(2) unless all of the following occur, if applicable:

(a) Enforcement action is taken against the minor who purchased or attempted to purchase, consumed or attempted to consume, or possessed or attempted to possess alcoholic liquor.

(b) Enforcement action is taken under this section against the person 21 years of age or older who is not the retail licensee or the retail licensee's clerk, agent, or employee who sold or furnished the alcoholic liquor to the minor.

(c) Enforcement action under this section is taken against the clerk, agent, or employee who directly sold or furnished alcoholic liquor to the minor.

(5) If the enforcing agency is the commission and an appearance ticket or civil infraction citation has not been issued, then the commission shall recommend to a local law enforcement agency that enforcement action be taken against a violator of this section or section 703 who is not a licensee. However, subsection (4) does not apply if the minor against

whom enforcement action is taken under section 703, the clerk, agent, or employee of the licensee who directly sold or furnished alcoholic liquor to the minor, or the person 21 years of age or older who sold or furnished alcoholic liquor to the minor is not alive or is not present in this state at the time the licensee is charged. Subsection (4)(a) does not apply under either of the following circumstances:

(a) The violation of subsection (1) is the result of an undercover operation in which the minor purchased or received alcoholic liquor under the direction of the person's employer and with the prior approval of the local prosecutor's office as part of an employer-sponsored internal enforcement action.

(b) The violation of subsection (1) is the result of an undercover operation in which the minor purchased or received alcoholic liquor under the direction of the state police, the commission, or a local police agency as part of an enforcement action.

(6) Any initial or contemporaneous purchase or receipt of alcoholic liquor by the minor under subsection (5)(a) or (b) must have been under the direction of the state police, the commission, or the local police agency and must have been part of the undercover operation.

(7) If a minor participates in an undercover operation in which the minor is to purchase or receive alcoholic liquor under the supervision of a law enforcement agency, his or her parents or legal guardian shall consent to the participation if that person is less than 18 years of age.

(8) In an action for the violation of this section, proof that the defendant or the defendant's agent or employee demanded and was shown, before furnishing alcoholic liquor to a minor, a motor vehicle operator's or chauffeur's license or a registration certificate issued by the federal selective service, or other bona fide documentary evidence of the age and identity of that person, shall be a defense to an action brought under this section.

(9) The commission shall provide, on an annual basis, a written report to the department of state police as to the number

of actions heard by the commission involving violations of this section and section 801(2). The report shall include the disposition of each action and contain figures representing the following categories:

(a) Decoy operations.

(b) Off-premises violations.

(c) On-premises violations.

(d) Repeat offenses within the 3 years preceding the date of that report.

(10) As used in this section:

(a) "Corrective action" means action taken by a licensee or a clerk, agent, or employee of a licensee designed to prevent a minor from further possessing or consuming alcoholic liquor on the licensed premises. Corrective action includes, but is not limited to, contacting a law enforcement agency and ejecting the minor and any other person suspected of aiding and abetting the minor.

(b) "Diligent inquiry" means a diligent good faith effort to determine the age of a person, which includes at least an examination of an official Michigan operator's or chauffeur's license, an official Michigan personal identification card, or any other bona fide picture identification which establishes the identity and age of the person.

436.1801 Granting or renewal of license; surety; selling, furnishing, or giving alcoholic liquor to minor or to person visibly intoxicated; right of action for damage or personal injury; actual damages; institution of action; notice; survival of action; general reputation as evidence of relation; separate actions by parents; commencement of action against retail licensee; indemnification; defenses available to licensee; rebuttable presumption; prohibited causes of action; section as exclusive remedy for money damages against licensee; civil action subject to revised judicature act.

Sec. 801. (1) Except as otherwise provided in this act, before the approval and granting, or renewal, of a license, the

following licensees or applicants for that license shall make, execute, and deliver to the commission a bond executed by a surety company authorized to do business in the state or, in the discretion of the commission, by approved personal surety running to the people of the state, in the following amounts:

(a) A manufacturer of beer, a manufacturer of wine, a mixed spirit drink manufacturer, an outstate seller of beer, an outstate seller of mixed spirit drink, and an outstate seller of wine, a bond in an amount equal to 1/12 of the total beer, mixed spirit drink, or wine excise taxes paid to the state in the last calendar year or a bond in the sum of $1,000.00, whichever is greater, for the faithful performance of the conditions of the license issued and for compliance with this act. A surety shall not cancel a bond issued under this subdivision except upon 30 days' written notice to the commission.

(b) A special license authorizing the sale of beer, mixed spirit drink, wine, or spirits for consumption on the premises, a bond in the sum of $1,000.00. A bond issued under this subdivision shall remain in effect for 60 days after the expiration of the special license. A bond is not required for a church or school.

(2) A retail licensee shall not directly, individually, or by a clerk, agent, or servant sell, furnish, or give alcoholic liquor to a minor except as otherwise provided in this act. A retail licensee shall not directly or indirectly, individually or by a clerk, agent, or servant sell, furnish, or give alcoholic liquor to a person who is visibly intoxicated.

(3) Except as otherwise provided in this section, an individual who suffers damage or who is personally injured by a minor or visibly intoxicated person by reason of the unlawful selling, giving, or furnishing of alcoholic liquor to the minor or visibly intoxicated person, if the unlawful sale is proven to be a proximate cause of the damage, injury, or death, or the spouse, child, parent, or guardian of that individual, shall have a right of action in his or her name against the person who by selling, giving, or furnishing the alcoholic liquor has caused or contributed to the intoxication of the person or who has caused

or contributed to the damage, injury, or death. In an action pursuant to this section, the plaintiff shall have the right to recover actual damages in a sum of not less than $50.00 in each case in which the court or jury determines that intoxication was a proximate cause of the damage, injury, or death.

(4) An action under this section shall be instituted within 2 years after the injury or death. A plaintiff seeking damages under this section shall give written notice to all defendants within 120 days after entering an attorney-client relationship for the purpose of pursuing a claim under this section. Failure to give written notice within the time specified shall be grounds for dismissal of a claim as to any defendants that did not receive that notice unless sufficient information for determining that a retail licensee might be liable under this section was not known and could not reasonably have been known within the 120 days. In the event of the death of either party, the right of action under this section shall survive to or against his or her personal representative. In each action by a husband, wife, child, or parent, the general reputation of the relation of husband and wife or parent and child shall be prima facie evidence of the relation, and the amount recovered by either the husband, wife, parent, or child shall be his or her sole and separate property. The damages, together with the costs of the action, shall be recovered in an action under this section. If the parents of the individual who suffered damage or who was personally injured are entitled to damages under this section, the father and mother may sue separately, but recovery by 1 is a bar to action by the other.

(5) An action under this section against a retail licensee shall not be commenced unless the minor or the alleged intoxicated person is a named defendant in the action and is retained in the action until the litigation is concluded by trial or settlement.

(6) Any licensee subject to the provisions of subsection (3) regarding the unlawful selling, furnishing, or giving of alcoholic liquor to a visibly intoxicated person shall have the right to full indemnification from the alleged visibly

intoxicated person for all damages awarded against the licensee.

(7) All defenses of the alleged visibly intoxicated person or the minor shall be available to the licensee. In an action alleging the unlawful sale of alcoholic liquor to a minor, proof that the defendant retail licensee or the defendant's agent or employee demanded and was shown a Michigan driver license or official state personal identification card, appearing to be genuine and showing that the minor was at least 21 years of age, shall be a defense to the action.

(8) There shall be a rebuttable presumption that a retail licensee, other than the retail licensee who last sold, gave, or furnished alcoholic liquor to the minor or the visibly intoxicated person, has not committed any act giving rise to a cause of action under subsection (3).

(9) The alleged visibly intoxicated person shall not have a cause of action pursuant to this section and a person shall not have a cause of action pursuant to this section for the loss of financial support, services, gifts, parental training, guidance, love, society, or companionship of the alleged visibly intoxicated person.

(10) This section provides the exclusive remedy for money damages against a licensee arising out of the selling, giving, or furnishing of alcoholic liquor.

(11) Except as otherwise provided for under this section and section 815, a civil action under subsection (3) against a retail licensee shall be subject to the revised judicature act of 1961, 1961 PA 236, MCL 600.101 to 600.9947.

436.1903 Suspension or revocation of license; violation of act or rules; penalty; disposition; hearing; procedure, fee; right of appeal; institution of criminal prosecutions; defense; rules; appointment of agents to hear violation cases; authority and responsibility; ineligibility of designated agent for appointment to commission.

Sec. 903. (1) The commission or any commissioner or duly authorized agent of the commission designated by the

chairperson of the commission, upon due notice and proper hearing, may suspend or revoke any license upon a violation of this act or any of the rules promulgated by the commission under this act. The commission or any commissioner or duly authorized agent of the commission designated by the chairperson of the commission, may assess a penalty of not more than $300.00 for each violation of this act or rules promulgated under this act, or not more than $1,000.00 for each violation of section 801(2), in addition to or in lieu of revocation or suspension of the license, which penalty shall be paid to the commission and deposited with the state treasurer and shall be credited to the general fund of the state. The commission shall hold a hearing and order the suspension or revocation of a license if the licensee has been found liable for 3 or more separate violations of section 801(2) which violations occurred on different occasions within a 24-month period unless such violations for the sale, furnishing, or giving alcoholic liquor to a minor were discovered by the licensee and disclosed to an appropriate law enforcement agency immediately upon discovery.

(2) The commission shall provide a procedure by which a licensee who is aggrieved by any penalty imposed under subsection (1) and any suspension or revocation of a license ordered by the commission, a commissioner, or a duly authorized agent of the commission may request a hearing for the purpose of presenting any facts or reasons to the commission as to why the penalty, suspension, or revocation should be modified or rescinded. Any such request shall be in writing and accompanied by a fee of $25.00. The commission, after reviewing the record made before a commissioner or a duly authorized agent of the commission, may allow or refuse to allow the hearing in accordance with the commission's rules. The right to a hearing provided in this subsection, however, shall not be interpreted by any court as curtailing, removing, or annulling the right of the commission to suspend or revoke licenses as provided for in this act. A licensee does not have a right of appeal from the final determination of the commission,

except by leave of the circuit court. Notice of the order of suspension or revocation of a license or of the assessment of a penalty, or both, shall be given in the manner prescribed by the commission. The suspension or revocation of a license or the assessment of a penalty, or both, by the commission or a duly authorized agent of the commission does not prohibit the institution of a criminal prosecution for a violation of this act. The institution of a criminal prosecution for a violation of this act or the acquittal or conviction of a person for a violation of this act does not prevent the suspension or revocation of a license or the assessment of a penalty, or both, by the commission. In a hearing for the suspension or revocation of a license issued under this act, proof that the defendant licensee or an agent or employee of the licensee demanded and was shown, before furnishing any alcoholic liquor to a minor, a motor vehicle operator or chauffeur license or a registration certificate issued by the federal selective service, or other bona fide documentary evidence of majority and identity of the person, may be offered as evidence in a defense to a proceeding for the suspension or revocation of a license issued under this act. A licensee who has reason to believe that a minor has used fraudulent identification to purchase alcoholic liquor in violation of section 703 shall file a police report concerning the violation with a local law enforcement agency and shall also present the alleged fraudulent identification to the local law enforcement agency at the time of filing the report if the identification is in the possession of the licensee. The commission may promulgate rules pursuant to the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328, regarding the utilization by licensees of equipment designed to detect altered or forged driver licenses, state identification cards, and other forms of identification.

(3) In addition to the hearing commissioners provided for in section 209, the chairperson of the commission may designate not more than 2 duly authorized agents to hear violation cases. A person appointed under this subsection shall be a member in good standing of the state bar of Michigan.

(4) A duly authorized agent who has been designated by the chairperson pursuant to subsection (3) shall have, in the hearing of violation cases, the same authority and responsibility as does a hearing commissioner under this act and the rules promulgated under this act.

(5) A duly authorized agent who has been designated by the chairperson pursuant to subsection (3) shall be ineligible for appointment to the commission for a period of 1 year after the person ceases to serve as a duly authorized agent.

436.1909 Violation of act as misdemeanor; penalties; legislative intent.

Sec. 909. (1) Except as otherwise provided in this act, a person, other than a person required to be licensed under this act, who violates this act is guilty of a misdemeanor.

(2) Except as otherwise provided in this act, a licensee who violates this act, or a rule or regulation promulgated under this act, is guilty of a misdemeanor punishable by imprisonment for not more than 6 months or a fine of not more than $500.00, or both.

(3) A person who performs any act for which a license is required under this act without first obtaining that license or who sells alcoholic liquor in a county that has prohibited the sale of alcoholic liquor under section 1107 is guilty of a felony punishable by imprisonment for not more than 1 year or by a fine of not more than $1,000.00, or both.

(4) It is the intent of the legislature that the court, in imposing punishment under this section, should discriminate between casual or slight violations and habitual sales of alcoholic liquor or attempts to commercialize violations of this act or the rules or regulations promulgated under this act.

R 436.1515 Sale and delivery of alcoholic liquor.

Rule 15. (1) An off-premise licensee who is licensed to sell beer and wine shall not take orders for the sale of beer or wine and have the delivery of the beer or wine made to the retail customer by a wholesaler, manufacturer of beer or wine, an outstate seller of beer or wine, or their licensed representatives or salesperson, without the prior written approval of the commission.

(2) An off-premise licensee who is licensed to sell spirits shall not knowingly allow the delivery of spirits to a retail customer by a licensed representative or salesperson, unless the licensed representative or salesperson is acting on behalf of the retail customer.

R 436.1719 Requirements for sale of bottled wine.

Rule 19. (1) Bottled wine shall not be offered for sale, kept for sale, sold, delivered, or otherwise introduced into this state unless all of the following provisions have been complied with:

(a) The wine is bottled, packaged, marked, branded, and labeled under these rules.

(b) The wine label truthfully describes the contents of the container in accordance with these rules and the federal wine regulations published in 27 C.F.R. part 4, subpart D, §§4.1 to 4.80, of 1935, as amended, which are adopted in these rules by reference. Copies of the adopted provisions may be obtained from the Superintendent of Documents, United States Government Printing Office, Washington, DC 20402. The cost at the time of adoption of these rules is $49.00. Copies of these provisions may also be obtained from the Liquor Control Commission, Department of Consumer and Industry Services, Secondary Complex, 7150 Harris Drive, P.O. Box 30005, Lansing, Michigan 48909, at a cost of $55.00 each.

(c) The wine has received a registration number of approval from the commission.

(2) The commission reserves the right to disapprove any wine label submitted for registration that is deemed to

promote violence, racism, sexism, intemperance or intoxication or to be detrimental to the health, safety, or welfare of the general public.

(3) Bottled wine shall not be shipped, delivered, or otherwise introduced into this state unless it is accompanied by an invoice, manifest, or other shipping document listing the quantity of bottled wine, by brand name and corresponding registration number of approval, that is being shipped, delivered, or introduced into this state.

(4) A manufacturer, rectifier, or outstate seller of wine who is responsible for labeling shall furnish proof, upon request, that valid certificates of approval for the label have been obtained from, and are unrevoked under, the federal labeling requirements as published in 27 C.F.R. part 4, subpart D, §§4.1 to 4.80, of 1935, as amended.

(5) A shipment of bottled wine from a manufacturer or an outstate seller of wine shall be made only to a licensed wholesaler at the address of the licensed premises, except upon written order of the commission.

(5) (4)

No. 03-1116 and No. 03-1120

Supreme Court, U.S.
FILED
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In the Supreme Court of the United States

JENNIFER M. GRANHOLM, ET AL., PETITIONERS

v.

ELEANOR HEALD, ET AL.

MICHIGAN BEER & WINE WHOLESALERS ASSOCIATION, PETITIONER

v.

ELEANOR HEALD, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a state law allowing in-state wineries to make direct shipments of wine to consumers, but barring out-of-state wineries from doing so, is discriminatory and therefore violates the Commerce Clause of the Constitution, notwithstanding section 2 of the Twenty-first Amendment.

PARTIES TO THE PROCEEDINGS

The petitioners in No. 03-1116, who were defendants-appellees below and who are nominal respondents in No. 03-1120, are Jennifer M. Granholm, Governor of the State of Michigan; Michael A. Cox, Attorney General of the State of Michigan; and Nida R. Samona, Chairperson of the Michigan Liquor Control Commission.

The petitioner in No. 03-1120, which was an intervening defendant-appellee below and which is a nominal respondent in No. 03-1116, is the Michigan Beer and Wine Wholesalers Association.

Respondents in both No. 03-1116 and No. 03-1120, who were plaintiffs-appellants below, are Eleanor Heald; Ray Heald; John Arundel; Karen Brown; Richard Brown; Bonnie McMinn; Gregory Stein; Michelle Morlan; William Horwath; Margaret Christina; Robert Christina; Trisha Hopkins; Jim Hopkins; and Domaine Alfred, Inc.

STATEMENT PURSUANT TO RULE 29.6

Domaine Alfred, Inc., has no parent corporation, and no publicly held company owns 10% or more of its stock.

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INTRODUCTION

These petitions present a novel constitutional question: whether protectionist, anti-consumer state laws allowing in-state wineries to make direct shipments of wine to consumers, but barring out-of-state ones from doing so, are unconstitutional under the Commerce Clause, despite the regulatory power granted to States by section 2 of the Twenty-first Amendment.

While undeniably interesting, this constitutional question does not mandate the Court's attention at this time. When measured against the traditional standards for granting certiorari, this Court's review is, for now, unwarranted. Contrary to petitioners' assertions, no genuine circuit split exists on whether discriminatory state laws allowing direct shipping by in-state wineries, but barring direct shipping by out-of-state wineries, are unconstitutional. All of the circuits that have passed on the constitutionality of such discriminatory laws have invalidated them, consistent with this Court's recent pronouncements on the relationship between the Commerce Clause and the Twenty-first Amendment. Other circuits either have upheld narrower state laws on the ground that they do not discriminate against out-of-state interests, or have refrained from ruling pending further factual development.

Moreover, this case presents a less than ideal vehicle for consideration of the underlying constitutional question. At a minimum, this Court should await a case that presents *both* the question whether a plainly discriminatory state law is constitutional, *and* the related (and itself substantial) question whether, if such a law is unconstitutional, the appropriate remedy is to allow direct shipping by out-of-state wineries or to ban direct shipping by in-state wineries. And this Court can afford to wait, both because other challenges to direct-shipping laws are currently pending in the federal courts and because States are increasingly repealing such laws and enacting non-discriminatory ones in response to the outcry from consumers and wineries alike. The petitions for certiorari should therefore

be denied. In the alternative, in light of a recent Federal Trade Commission report condemning such discriminatory laws, and in light of the broader federal regulatory interests here, the Court may wish to call for the views of the Solicitor General.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent constitutional and statutory provisions are reproduced in the petitions at 03-1116 Pet. 1-2 and 44a-71a and 03-1120 Pet. 2 and 45a-69a.

COUNTERSTATEMENT OF THE CASE

1. In 1933, the Twenty-first Amendment was ratified, ending Prohibition. In its wake, most States adopted a "three-tier" regulatory system for alcohol distribution. *See* 03-1116 Pet. 2. Under that system, producers of alcoholic beverages are typically required to sell their products to licensed wholesalers or distributors, who in turn sell to retailers, who in turn sell to consumers. *See* Staff of the Federal Trade Commission, *Possible Anticompetitive Barriers to E-Commerce: Wine* 5 (July 2003) (hereafter "FTC Report"). In addition, producers of alcoholic beverages who wish to sell their products in interstate commerce are required to obtain a "basic permit" from the federal Alcohol and Tobacco Tax and Trade Bureau (a recent spinoff from the Bureau of Alcohol, Tobacco and Firearms). *See* 27 U.S.C. §§ 203-204.

In the decades since States initially adopted the "three-tier" regulatory system, the American wine industry has grown exponentially. There are now more than 3,000 wineries in all 50 States—over twice as many as there were 30 years ago. *See* WineAmerica, *Wine Facts 2004*, *at* http://www.americanwineries.org/winedata/winefacts04.htm (last visited Apr. 5, 2004); FTC Report 6. Many of these wineries produce relatively small amounts of wine. *See id.* And there has been an accompanying explosion in wine-related tourism—even in States not previously known for their wine industries, such as

Virginia. *See, e.g.*, James T. Yenckel, *Virginia Vintage*, L.A. Times, July 1, 2001, at L13.

While the number of wineries has grown dramatically, the number of wholesalers that distribute wine has correspondingly shrunk, from several thousand in the 1950s to a few hundred today. *See* FTC Report 6. As a result of this consolidation, many wineries, especially smaller ones, have found it increasingly difficult to identify wholesalers willing to carry their products. *See id.* Consumers have likewise complained that they are unable to obtain certain wines from local retailers or to ship wine home when touring out-of-state wineries. *See, e.g.*, *Beskind v. Easley*, 325 F.3d 506, 510-11 (4th Cir. 2003) (discussing typical claims). In addition, with the advent of the Internet, consumers have increasingly sought to order wine online. *See* FTC Report 5.

In response, some 26 States have thus far passed laws allowing in-state and out-of-state wineries to make direct shipments of wine to consumers. *See* Wine Institute, *Direct Shipment Laws by State for Wineries*, *at* http://www.wineinstitute.org/shipwine/analysis/intro_analysis.htm (last modified Mar. 15, 2004). While varying somewhat, these laws typically allow consumers to order restricted amounts of wine from in-state wineries or wineries in States that have reciprocal laws. *See* FTC Report 8. Most of these laws require wineries to obtain licenses before engaging in direct shipping, to remit taxes on their shipments, and to label their packages or obtain an adult signature to prevent wine from being delivered to minors. *See id.* at 8, 26-40.

A number of other States, however, have passed discriminatory laws allowing only in-state wineries, and not out-of-state wineries, to make direct shipments to consumers. In doing so, many state legislatures have candidly admitted their desire to promote the in-state wine industry at the expense of the out-of-state wine industry, by increasing the sale and consumption of wine produced by in-state wineries. *See, e.g.*,

Dickerson v. Bailey, 336 F.3d 388, 399 (5th Cir. 2003) (detailing legislative history of Texas Wine Marketing Act). Wineries and consumers have filed lawsuits around the country, challenging the constitutionality of laws in this latter category.

2. The instant lawsuit involves Michigan's laws governing direct shipping. While the operation of the Michigan Liquor Control Code is somewhat complex, the bottom line is not: Michigan allows only in-state wineries, and not out-of-state wineries, to make direct shipments to Michigan consumers. Specifically, Michigan law enables only licensed "wine makers" to make direct shipments. *See* Mich. Comp. Laws § 436.1113(9); *cf.* Mich. Comp. Laws § 436.1111(7) (defining "sale"). The Michigan Liquor Control Commission has construed this statutory provision to allow only in-state wineries, and not out-of-state wineries, to obtain a "wine maker" license. *See* C.A. App. 97-100, 104-05.[1] Out-of-state

[1] Michigan contends that out-of-state wineries "may apply to the Liquor Control Commission to direct ship to consumers and bypass the three-tier system by Commission order." 03-1116 Pet. 3. The statutory provision Michigan cites for that proposition, however, is merely a generic statute stating that the sale or importation of alcohol in Michigan is banned unless authorized by the commission. *See* Mich. Comp. Laws § 436.1203(1). Michigan concedes, as it must, that "[t]he policy of the Liquor Control Commission" has been to deny applications by out-of-state wineries to obtain licenses to engage in direct shipping, 03-1116 Pet. 3, and indeed freely recognizes that "[i]n-state wineries are excepted from the three-tier system," *id.* at 4.

Petitioners alternatively contend that "[a]ny qualified out-of-state manufacturer may establish a physical presence in Michigan and be licensed in Michigan as a wine maker." 03-1120 Pet. 5 n.2; *see also* 03-1116 Pet. 23 (same). But petitioners did not make this argument before the Sixth Circuit. *See, e.g.*, C.A. Br. of Intervenor 21 n.8 (discussing "wine maker" provision). Moreover, in order to qualify for a "wine maker" license under the Michigan Liquor Control Commission's construction, an out-of-state winery would actually have to open a *winery* in Michigan, not merely "establish a physical presence" (say, by opening an office). *See* C.A. App. 97-100, 104-05; *cf.* 03-1120 Pet. 10 (contending that "out-of-state wineries may equally *locate* in Michigan and be licensed to sell directly") (emphasis added).

wineries may obtain only an "outstate seller of wine" license, which enables them to make shipments only to licensed wholesalers for distribution through the preexisting "three-tier" system. *See* Mich. Comp. Laws §§ 436.1109(9), 436.1607(1); Mich. Admin. Code rr. 436.1705(2)(d), 436.1719(5).[2]

3. Plaintiffs, various Michigan wine consumers and journalists and an out-of-state winery, brought suit against defendants, various state officials (hereafter "Michigan"), contending that the Michigan regulatory scheme discriminated against interstate commerce in violation of the dormant Commerce Clause. The defendants contended that the Michigan regulatory scheme constituted a valid exercise of the State's power under section 2 of the Twenty-first Amendment. Michigan Beer & Wine Wholesalers Association (hereafter "the wholesalers"), a lobbying organization for the Michigan liquor-distribution industry, intervened in support of the defendants.

In a brief unpublished opinion, the district court granted summary judgment to the defendants, and denied summary judgment to the plaintiffs. *See* 03-1116 Pet. 25a-35a; 03-1120 Pet. 25a-35a. The court observed that the case law concerning direct-shipping laws was "sparse." *See* 03-1116 Pet. 29a; 03-1120 Pet. 29a. Relying heavily on the Seventh Circuit's decision in *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000)—the only extant court of appeals decision on the constitutionality of a direct-shipping law—the court reasoned that section 2 of the Twenty-first Amendment "authorize[d] the

[2] Michigan claims that petitioners conceded below that "there was nothing in the Michigan law that prohibits out-of-state direct sales and shipments of beverage alcohol." 03-1116 Pet. 19. While petitioners did concede that there is no Michigan statutory provision *specifically* prohibiting direct shipments by out-of-state wineries, *see* C.A. Br. of Appellants 3 n.1, it is undisputed that (1) *any* sale of alcohol in Michigan is banned unless otherwise authorized by the Liquor Control Commission, *see* Mich. Comp. Laws § 436.1203(1), and (2) out-of-state wineries cannot obtain authorization to engage in direct shipping, *see* Mich. Comp. Laws § 436.1113(9); C.A. App. 97-100, 104-05.

states to control alcohol in ways that it [*sic*] cannot control cheese." 03-1116 Pet. 33a; 03-1120 Pet. 33a (internal quotation omitted). The court conceded that a State's power under the Twenty-first Amendment was not "complete." *See* 03-1116 Pet. 34a; 03-1120 Pet. 34a. In order to avail itself of the Twenty-first Amendment, the court continued, a State must act in such a way as to further the "core" concerns of the amendment. *See* 03-1116 Pet. 34a; 03-1120 Pet. 34a. In a single paragraph of analysis, the court stated that Michigan's direct-shipping scheme furthered such a core concern because it was "one provision of a comprehensive system that regulates the flow of alcoholic beverages into and within the State of Michigan." 03-1116 Pet. 34a; 03-1120 Pet. 34a. The court concluded that this overall system was necessary to ensure the collection of taxes and to reduce the risk that minors would obtain alcohol. *See* 03-1116 Pet. 34a-35a; 03-1120 Pet. 34-35a. The court then denied plaintiffs' motion for reconsideration, stating that "[t]he three-tier distribution system is a proper exercise of [Michigan's] constitutional authority" under the Twenty-first Amendment. 03-1116 Pet. 38a-39a; 03-1120 Pet. 39a.

4. The Sixth Circuit (Daughtrey, J., joined by Guy and Boggs, JJ.) reversed. *See* 03-1116 Pet. 1-18a; 03-1120 Pet. 1a-17a. The court began by recognizing that, in a series of decisions immediately after ratification of the Twenty-first Amendment, the Supreme Court had "afforded the states nearly limitless power to regulate alcohol under the new amendment." 03-1116 Pet. 8a; 03-1120 Pet. 8a. The court reasoned, however, that Michigan's reliance on those cases was "disingenuous at best because, as early as the 1960s, the Supreme Court signaled a break with this line of reasoning." 03-1116 Pet. 9a; 03-1120 Pet. 8a. Under this Court's subsequent cases, the court continued, challenges to state alcohol laws should be assessed by "determining how closely related the law in question is to the 'core concerns' of the

Twenty-first Amendment." 03-1116 Pet. 10a; 03-1120 Pet. 9a.

After reviewing this Court's more recent cases, the Sixth Circuit concluded that the mere fact that a State was *motivated* by the "core concerns" of the Twenty-first Amendment could not "shield its laws from constitutional scrutiny." 03-1116 Pet. 11a; 03-1120 Pet. 10a-11a. The court noted that facially discriminatory laws are still subject to strict scrutiny under the dormant Commerce Clause, with the result that the State must prove that no reasonable non-discriminatory alternatives are available to advance the State's legitimate purposes. *See* 03-1116 Pet. 11a; 03-1120 Pet. 11a. The court "reject[ed] the implication that a state's 'virtually complete control' over liquor regulation enables it to discriminate against out-of-state interests in favor of in-state interests." 03-1116 Pet. 12a; 03-1120 Pet. 11a. According to the court, such an approach was "simply forbid[den]" by this Court's decision in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), which struck down a tax exemption for certain locally produced alcoholic beverages. 03-1116 Pet. 12a; 03-1120 Pet. 11a.

Applying this analytical framework to the Michigan statute, the Sixth Circuit rejected the district court's characterization of the Michigan direct-shipping scheme as a "constitutionally benign product of the state's three-tier system." 03-1116 Pet. 12a; 03-1120 Pet. 11a. As to the dormant Commerce Clause, the court concluded that "it is clear that the Michigan statutory and regulatory scheme treats out-of-state and in-state wineries differently, with the effect of benefitting the in-state wineries and burdening those from out of state." 03-1116 Pet. 14a; 03-1120 Pet. 13a. The court noted that, under the Michigan system, in-state wineries would enjoy both greater access to consumers and greater profits by virtue of their exemption from the three-tier system. *See* 03-1116 Pet. 14a; 03-1120 Pet. 13a.

The Sixth Circuit then considered whether the Michigan direct-shipping scheme furthered any of the "core concerns" of the Twenty-First Amendment and, if so, whether those concerns

could be adequately served by any non-discriminatory alternatives. *See* 03-1116 Pet. 15a; 03-1120 Pet. 14a. The court answered no to both questions. *See* 03-1116 Pet. 15a; 03-1120 Pet. 14a. The court added that "the relevant inquiry is not whether Michigan's three-tier system *as a whole* promotes the goals of temperance, ensuring an orderly market, and raising revenue, but whether the discriminatory scheme challenged in this case * * * does so." 03-1116 Pet. 15a; 03-1120 Pet. 14a (internal quotation omitted).

Finally, the Sixth Circuit rejected the district court's reliance on the Seventh Circuit's decision in *Bridenbaugh*. *See* 03-1116 Pet. 16a-17a; 03-1120 Pet. 15a-17a. The court reasoned that *Bridenbaugh* was "distinguishable on its facts." 03-1116 Pet. 16a; 03-1120 Pet. 16a. It noted that *Bridenbaugh* "did not involve any out-of-state wineries as plaintiffs, and it thus addressed only whether the Indiana statute discriminated against customers who wanted to have out-of-state wine shipped directly to them." 03-1116 Pet. 17a; 03-1120 Pet. 16a. The court added that "it appears the Indiana statutes differ from the provisions at issue here," because those statutes required every drop of liquor, whether from an in-state or out-of-state producer, to pass through the "three-tier" system. 03-1116 Pet. 17a; 03-1120 Pet. 16a. Finally, the court noted that, in *Bridenbaugh*, the out-of-state sellers did not have or want permits, whereas here, the out-of-state sellers wanted permits and were willing to pay taxes on any direct shipments. *See* 03-1116 Pet. 17a; 03-1120 Pet. 16a-17a.

5. Both Michigan and the wholesalers petitioned for rehearing by the panel and rehearing *en banc*. The Sixth Circuit denied both petitions without dissent. *See* 03-1116 Pet. 21a-22a; 03-1120 Pet. 21a-22a.

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS CORRECTLY HELD THAT MICHIGAN'S DIRECT-SHIPPING SCHEME IS UNCONSTITUTIONAL.

The Sixth Circuit's holding that the Michigan direct-shipping scheme is discriminatory under the dormant Commerce Clause, and cannot be "saved" from a holding of unconstitutionality by section 2 of the Twenty-first Amendment, is entirely consistent with this Court's precedents—especially the Court's recent precedents addressing the interplay between those two constitutional provisions.

A. This Court has a long history of reviewing state regulations regarding alcoholic beverages. Before the Civil War, the Court held that States had essentially plenary power to regulate the production and trade of alcoholic beverages within their borders. *See License Cases*, 46 U.S. (5 How.) 504, 577 (1847) (Taney, C.J.). In the late nineteenth century, however, the Court, applying its then-prevailing muscular view of the dormant Commerce Clause, began to whittle away at that power. Thus, while the Court continued to allow States to prohibit the production and consumption of alcohol within their borders, *see Mugler v. Kansas*, 123 U.S. 623, 661-63 (1887), the Court also held that States could not restrict the *importation* of liquor to persons possessing a permit, *see Bowman v. Chicago & Northwestern Ry.*, 125 U.S. 465, 499-500 (1888), and then held that States could not regulate the importation or *resale* of alcohol as long as the alcohol remained in its original package, *see Leisy v. Hardin*, 135 U.S. 100, 108-10 (1890).

The practical, and perverse, result of these decisions was that States could regulate alcohol produced by in-state persons, but not alcohol produced by out-of-state persons. In order to eliminate this disparity, Congress enacted the Wilson Act, which authorized States to regulate imported alcohol "to the same extent and in the same manner" as non-imported alcohol.

26 Stat. 313 (1890). This Court, however, construed the Wilson Act to empower States to regulate only the *resale* of imported alcohol, not the direct *shipment* of alcohol to consumers. *See Rhodes v. Iowa*, 170 U.S. 412, 423 (1898); *Vance v. W.A. Vandercook Co.*, 170 U.S. 438, 446 (1898). Again acting to eliminate the disparity in treatment between in-state and out-of-state producers, therefore, Congress passed the Webb-Kenyon Act, which states, in relevant part, that "[t]he shipment or transportation * * * of * * * intoxicating liquor of any kind from one State, Territory, or District of the United States * * * into any State, Territory, or District of the United States * * * to be received, possessed, sold, or in any manner used * * * in violation of any law of such State, Territory, or District * * * is prohibited." 37 Stat. 699 (1913).[3]

B. In 1919, the Eighteenth Amendment was ratified, and the "Noble Experiment" of nationwide Prohibition began. *See, e.g.*, William E. Leuchtenburg, *The Perils of Prosperity 1914-1932*, at 212-17 (2d ed. 1993). In 1933, that experiment came to an end with the ratification of the Twenty-first Amendment. Section 1 of that amendment repealed the Eighteenth Amendment, and thereby ended nationwide Prohibition. For its part, the lesser-known section 2 of that amendment effectively "incorporate[d] [the Webb-Kenyon Act] permanently in the Constitution." 76 Cong. Rec. 4172 (1933) (statement of Sen. Robinson). Section 2, whose language tracks that of the Webb-Kenyon Act almost exactly, was designed to put to rest any lingering doubts about the Webb-Kenyon Act's own constitutionality. *See id.* at 4170 (statement of Sen. Borah). Numerous members of Congress—including Senator Blaine, the amendment's sponsor—stated that the purpose of section 2 was to authorize those States that wished to remain "dry" to do so. *See, e.g., id.* at 4141 (statement of Sen. Blaine); *id.* at 4170 (statement of Sen. Borah); *id.* at 4518 (statement of Rep.

[3] The Webb-Kenyon Act is reproduced in full at 03-1316 Pet. 44a and 03-1320 Pet. 46a. It is now codified at 27 U.S.C. § 122.

Robinson); *id.* at 4522-23 (statement of Rep. McSwain); *id.* at 4526 (statement of Rep. Tierney). Delegates to the state ratifying conventions made similar comments. *See, e.g., Ratification of the Twenty-first Amendment to the Constitution of the United States* 104, 316 (Everett Somerville Brown ed., 1938) (reprinted 1970). As with the Webb-Kenyon Act itself, nothing in the legislative or ratification history of the Twenty-first Amendment specifically indicates that section 2 was intended to allow States to discriminate *in favor of* in-state producers, at the expense of out-of-state ones.

C. In a series of short opinions in the period following the ratification of the Twenty-first Amendment, this Court did suggest that the power of States to regulate under section 2 was quite generous. *See, e.g., State Bd. of Equalization v. Young's Mkt. Co.*, 299 U.S. 59, 62-64 (1936); *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401, 403-04 (1938); *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518, 537-38 (1938); *Indianapolis Brewing Co. v. Liquor Control Comm'n*, 305 U.S. 391, 394 (1939); *Joseph S. Finch & Co. v. McKittrick*, 305 U.S. 395, 397-98 (1939); *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138-39 (1939); *Carter v. Virginia*, 321 U.S. 131, 136-38 (1944). But despite some broad statements to the effect that a State's power under section 2 is "unfettered by the Commerce Clause," *e.g., Ziffrin*, 308 U.S. at 138, even those early cases do not unambiguously stand for the proposition that section 2 authorizes *discrimination* against out-of-state producers.

In *Young's Market*—the case on which all of this Court's other early cases rely—this Court considered a constitutional challenge by wholesalers to California's post-Prohibition regulatory scheme, under which wholesalers were required to pay $50 for a wholesaler's license in order to distribute beer, and importers were required to pay an additional $500 in order to import beer into the State. *See* 299 U.S. at 60-61. Somewhat curiously, the Court began by *rejecting* plaintiffs' contention that this scheme was discriminatory and thereby violated the

dormant Commerce Clause. *See id.* at 61-62. The Court reasoned that, while the scheme may have imposed a burden on interstate commerce, "there is no discrimination against [plaintiffs] qua wholesalers," since wholesalers paid the same fee to sell either imported or domestic beer. *Id.* at 61. The Court therefore concluded that "the case does not present a question of discrimination prohibited by the commerce clause." *Id.* at 62. To be sure, the Court went on to reject the argument that, under section 2, "if [a State] permits [the] manufacture and sale [of alcohol], it must let imported liquors compete with the domestic on equal terms." *Id.* But the Court simultaneously rejected the contention that "the amendment has, in respect to liquor, freed the states from all restrictions upon the police power to be found in other provisions of the Constitution." *Id.* at 64. Therefore, insofar as subsequent cases characterized *Young's Market* as affirmatively holding that "discrimination against imported liquor is permissible," *e.g.*, *Mahoney*, 304 U.S. at 403, that characterization is at best questionable.

D. To the extent that some language in the Court's early cases interpreting the Twenty-first Amendment suggested that a State's power under section 2 was effectively unlimited, the Court soon after began distancing itself from such a view. In cases arising in a variety of contexts, the Court made clear that "the Amendment does not license the States to ignore their obligations under other provisions of the Constitution." *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 712 (1984). Thus, the Court held that section 2 did not alter analysis of the constitutionality of state laws under the Due Process Clause, *see Wisconsin v. Constantineau*, 400 U.S. 433, 436 (1971); the Equal Protection Clause, *see Craig v. Boren*, 429 U.S. 190, 204-09 (1976); the Export-Import Clause, *see Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341, 345-46 (1964); the Establishment Clause, *see Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 122 n.5 (1982); or the Free Speech Clause, *see 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516

(1996). The Court also held that, despite section 2, certain state laws relating to alcohol could be preempted by conflicting federal law enacted under Congress' affirmative Commerce Clause power. *See, e.g., Capital Cities*, 467 U.S. at 711-16; *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106-14 (1980).

The Court did continue to recognize that section 2 "created an exception to the normal operation of the Commerce Clause." *Craig*, 429 U.S. at 206. The Court expressly stated, however, that section 2 does not give States unfettered power to regulate notwithstanding the dormant Commerce Clause. In *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964), the Court considered the constitutionality of an action by the New York State Liquor Authority to terminate duty-free sales of alcohol to departing international airline travelers. At the outset, the Court noted that, absent the Twenty-first Amendment, the New York authorities would plainly have lacked the power to prohibit such sales, since the alcohol in question merely traveled through the State (under the auspices of the federal Bureau of Customs) for delivery to consumers in foreign countries. *See id.* at 329. The Court conceded that, "in the early years following adoption of the Twenty-first Amendment," it had "made clear * * * that by virtue of its provisions a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders." *Id.* at 330. The Court added, however, that "[t]o draw a conclusion from this line of decisions that the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause wherever regulation of intoxicating liquors is concerned would * * * be an absurd oversimplification." *Id.* at 331-32. The Court further noted that "[i]f the Commerce Clause had been pro tanto 'repealed,' then Congress would be left with no regulatory power over interstate or foreign commerce in intoxicating liquor." *Id.* at 332. "Such a

conclusion," the Court continued, "would be patently bizarre and is demonstrably incorrect." *Id.*

The Court concluded that because "the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution," "each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case." *Id.* Reasoning that New York's interest in regulating alcohol for ultimate use in a foreign country was comparatively slight, the Court held that the State's action was invalid. *See id.* at 333-34.

E. In its three most recent decisions specifically addressing the interplay between the dormant Commerce Clause and the Twenty-first Amendment, the Court has made clear that the Twenty-first Amendment "has a barely discernible effect in Commerce Clause cases." *City of Newport v. Iacobucci*, 479 U.S. 92, 98 (1986) (Stevens, J., dissenting). Most notably, in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), this Court considered the validity of a Hawaii statute that provided a tax exemption for certain locally produced alcoholic beverages. The Court began by recognizing that it had taken two different approaches in dormant Commerce Clause cases. *See id.* at 270. Where state legislation constituted "economic protectionism"—either because it had a discriminatory purpose or a discriminatory effect—the Court had applied a "stricter rule of invalidity." *Id.* Where, on the other hand, state legislation did not constitute "economic protectionism" but nevertheless burdened interstate commerce, the Court had adopted a "more flexible approach," inquiring into the "balance between local benefits and the burden on interstate commerce." *Id.* (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970)). The Court noted that the Hawaii statute had *both* a discriminatory purpose, since it was undisputed that the purpose of the exemption was to aid Hawaii industry, *and* a discriminatory effect, because the exemption applied only to locally produced beverages. *See id.* at 271. The Court rejected Hawaii's arguments that the tax

exemption was necessary because the local industry was struggling and that the exemption was designed to aid local producers rather than harm out-of-state ones. *See id.* at 272-73.

The Court then considered whether the tax exemption was "saved" by the Twenty-first Amendment. *See id.* at 274-76. The Court, citing *Young's Market* and other early cases, reasoned that "[d]espite broad language in some of the opinions of this Court written shortly after ratification of the Amendment, more recently we have recognized the obscurity of the legislative history of § 2." *Id.* at 274 (footnote omitted).[4] Relying on its decision in *Hostetter*, the Court noted that "[i]t is by now clear that the Amendment did not entirely remove state regulation of alcoholic beverages from the ambit of the Commerce Clause." *Id.* at 275. The Court reasoned that "[t]he question in this case is thus whether the principles underlying the Twenty-first Amendment are sufficiently implicated by the exemption * * * to outweigh the Commerce Clause principles that would otherwise be offended." *Id.*

Applying that approach, the Court concluded that the Twenty-first Amendment did not affect the analysis of the tax exemption's constitutionality. *See id.* at 276. The Court reasoned that it was "certain" that "[t]he central purpose of the [Twenty-first Amendment] was not to empower States to favor local liquor industries by erecting barriers to competition." *Id.* And the Court added that "[s]tate laws that constitute mere economic protectionism are therefore not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor." *Id.* Because the tax exemption

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[4] Notwithstanding petitioners' claims that "no Supreme Court case to date has directly overruled" *Young's Market* and the Court's other early Twenty-first Amendment decisions, 03-1116 Pet. 10 n.7, and that "these foundation cases [cannot] be written off as historical relics," 03-1120 Pet. 8, the *Bacchus* Court plainly refused to follow the "broad language" in those cases—over Justice Stevens' objection, in dissent, that *Young's Market* compelled the opposite result, *see Bacchus*, 468 U.S. at 282-87.

was not justified by a desire to promote temperance or to carry out any other purpose of the Twenty-first Amendment, the Court rejected Hawaii's reliance on the amendment, and invalidated the statute. *See id.*[5]

In two other cases, the Court applied similar reasoning in refusing to "save" state legislation under the Twenty-first Amendment. *See Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573 (1986); *Healy v. Beer Inst., Inc.*, 491 U.S. 324 (1989). In both cases, the Court considered the constitutionality of price-affirmation statutes, which required alcohol producers to affirm that they were selling their products at a price no higher than the lowest price elsewhere in the country. *See Brown-Forman*, 476 U.S. at 576; *Healy*, 491 U.S. at 328. In *Brown-Forman*, the Court held that a "prospective" price-affirmation statute violated the dormant Commerce Clause because it had the impermissible effect of regulating prices in other States. *See* 476 U.S. at 578-84. The Court reasoned that the statute could not be "saved" because the Twenty-first Amendment gave States no authority to control sales in other States. *See id.* at 584-85. In *Healy*, the Court held that a "contemporaneous" price-affirmation statute was invalid under the dormant Commerce Clause, not only because the statute impermissibly regulated prices in other States but also because the statute discriminated against alcohol producers and shippers engaged in interstate commerce. *See* 491 U.S. at 335-41. Following *Brown-Forman*, the Court reasoned that the statute could not be "saved" because the Twenty-first Amendment conferred no authority on States to regulate

[5] Petitioners suggest that the Court's Twenty-first Amendment analysis in *Bacchus* should somehow be discounted because "the 21st Amendment was never even raised as an issue in that case until it was before this Court," 03-1116 Pet. 12, and because "the State * * * barely attempted to invoke the Amendment in its defense," 03-1120 Pet. 10. The mere fact that an argument was not made below or was not made at length, however, does not magically render this Court's discussion of the argument dictum.

extraterritorially. *See id.* at 341-42. In an opinion concurring in the judgment, Justice Scalia, citing *Bacchus*, concluded that "[the law's] discriminatory character eliminates the immunity afforded by the Twenty-first Amendment." *Id.* at 344.[6]

F. Notwithstanding petitioners' efforts to distinguish this Court's cases on the interplay between the dormant Commerce Clause and the Twenty-first Amendment, *see, e.g.*, 03-1116 Pet. 10-13; 03-1120 Pet. 4, 10, those cases compel the result reached below. Under this Court's dormant Commerce Clause jurisprudence, state statutes that directly regulate or discriminate against interstate commerce, or that have the effect of favoring in-state interests over out-of-state ones, are "virtually *per se* invalid." *Brown-Forman*, 476 U.S. at 579.[7] As the Sixth Circuit correctly concluded, "it is clear that the Michigan statutory and regulatory scheme treats out-of-state and in-state wineries differently, with the effect of benefitting the in-state wineries and burdening those from out of state." 03-1116 Pet. 14a; 03-1120 Pet. 13a. Like Hawaii's taxation scheme in *Bacchus*, *see* 468 U.S. at 271, the Michigan direct-

[6] In *North Dakota v. United States*, 495 U.S. 423 (1990), the Court considered whether a State's reporting and labeling regulations applicable to alcohol shipped into federal enclaves were valid under the intergovernmental immunity doctrine. The Court held that they were. *See id.* at 434-44 (plurality opinion); *id.* at 444-48 (Scalia, J., concurring in the judgment). In dictum, Justice Stevens, writing for four Justices, stated that the State's "comprehensive system for the distribution of liquor within its borders" was enacted "[i]n the interest of promoting temperance, ensuring orderly market conditions, and raising revenue," and was thus "unquestionably legitimate" under the Twenty-first Amendment. *Id.* at 432 (plurality opinion).

[7] While the wholesalers accuse the Sixth Circuit of employing "the kind of judicial hostility usually associated with restrictions on speech or racial classifications," 03-1120 Pet. 9-10, there can be no doubt that this Court has applied heightened scrutiny to laws that discriminate against out-of-state commerce, just as it has to laws that discriminate against individuals or laws that restrict fundamental rights.

shipping scheme plainly has a discriminatory effect.[8]

As the Sixth Circuit also correctly concluded, petitioners cannot show either that the Michigan direct-shipping scheme "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives," as is necessary to save a discriminatory statute under the dormant Commerce Clause, *e.g.*, *New Energy Co. v. Limbach*, 486 U.S. 269, 278 (1988), or that it is "designed to promote temperance or to carry out any other purpose of the Twenty-first Amendment," as is necessary to save a discriminatory statute under section 2, *e.g.*, *Bacchus*, 468 U.S. at 276. Although petitioners protest that the prohibition on direct shipping by only out-of-state wineries is necessary to "prevent sales to minors, ensure applicable excise and sales taxes are collected, and that equal exposure to the State's strict alcohol regulatory regiment [*sic*] is achieved," 03-1116 Pet. 23; *see also* 03-1120 Pet. 6 (same), Michigan could readily effectuate all of those purposes by requiring out-of-state wineries, like in-state wineries, to obtain "wine maker" licenses before engaging in direct shipping; requiring them, like in-state wineries, to remit taxes on their shipments; and requiring them, like in-state wineries, to label their packages or obtain an adult signature to

[8] Michigan suggests that its direct-shipping scheme should instead be measured against the more deferential balancing test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), because "[o]ut-of-state wineries are not similarly situated to in-state wineries for regulation purposes." 03-1116 Pet. 23 (citing *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200, 216 (2d Cir. 2003)). The only way in which in-state and out-of-state wineries are differently situated here, however, is that in-state wineries may presently obtain a license to engage in direct shipping, whereas out-of-state wineries cannot. Where in-state and out-of-state interests are differently situated only by virtue of the very regulations being challenged, the balancing test of *Pike* is plainly inapplicable. Nor does the fact that there may be many *more* out-of-state wineries than in-state ones, *see* 03-1116 Pet. 4, 23, 24, alter the analysis, *see, e.g.*, *Bacchus*, 468 U.S. at 268-69 (holding that Hawaii statute was discriminatory despite fact that exempted locally produced alcoholic beverages constituted less than 1% of total alcohol sold in the State).

prevent wine from being delivered to minors.[9] Indeed, the FTC reached precisely this conclusion. As the FTC's recent nationwide study demonstrated, those States that have imposed similar requirements have reported "few or no problems with shipments to minors or with tax collection." FTC Report 4.[10] Unsurprisingly, therefore, the Sixth Circuit concluded, "based on the evidence in the record, that defendants have not shown that the Michigan scheme's discrimination between in-state and out-of-state wineries furthers any of the [State's] concerns * * *, much less that no reasonable non-discriminatory means exists to satisfy those concerns." 03-1116 Pet. 15a; 03-1120 Pet. 14a. This conclusion was evidently correct, and the Sixth Circuit's decision to invalidate Michigan's direct-shipping scheme was entirely consistent with this Court's precedents.[11]

[9] The Michigan Liquor Control Commission could impose all of these requirements through the simple expedient of allowing out-of-state wineries to obtain "wine maker" licenses, which would automatically subject them to the detailed requirements currently applicable to direct shipments by in-state wineries. *See* Mich. Comp. Laws § 436.1203.

[10] Citing an Alabama district-court decision, Michigan suggests that Michigan courts may lack personal jurisdiction over *unlicensed* out-of-state producers. *See* 03-1116 Pet. 13-14 & n.12, 16, 24. It seems doubtful at best, however, that Michigan courts would lack personal jurisdiction over an out-of-state producer that had purposely availed itself of the benefits of Michigan law by applying for a direct-shipping license. Contrary to the wholesalers' suggestion, *see* 03-1120 Pet. 11, once personal jurisdiction is established over out-of-state producers, Michigan could prosecute them for any violations of state law—either in state court or, under the Twenty-first Amendment Enforcement Act, in federal court, *see* 27 U.S.C. § 122a.

[11] To the extent that petitioners insinuate that the Webb-Kenyon Act somehow carries independent weight in the analysis, *see, e.g.*, 03-1116 Pet. 17; 03-1120 Pet. 2, 4, 9 & n.5, 11; *cf.* Ohio Br. 18-19 (same), that suggestion lacks merit. The only court of appeals expressly to have addressed this issue has held that, because section 2 of the Twenty-first Amendment, like the Webb-Kenyon Act, could constitute a reconveyance of authority to the States, and because the language of the Webb-Kenyon Act and section 2 is materially identical, the two provisions must be identically construed. *See Bainbridge v. Turner*, 311 F.3d 1104, 1110-11 (11th Cir. 2002).

II. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS.

The Sixth Circuit invalidated the Michigan direct-shipping scheme because it discriminated against interstate commerce. That holding is consistent not only with the prior decisions of this Court, but also with the decisions of other courts of appeals, all of which have invalidated similar state statutes and upheld only narrower ones.

A. As Michigan concedes, *see* 03-1116 Pet. 7, the Sixth Circuit's holding on the constitutionality of Michigan's direct-shipping scheme is unquestionably consistent with the recent holdings of the Fourth and Fifth Circuits concerning similar state laws.

1. In *Beskind v. Easley*, 325 F.3d 506 (4th Cir. 2003), the Fourth Circuit struck down North Carolina's direct-shipping laws, which unambiguously allowed in-state wineries but not out-of-state wineries to engage in direct shipping, *see id.* at 510. Writing for the court, Judge Niemeyer, joined by Judges Luttig and Traxler, began by tracing the history of the Twenty-first Amendment, noting that the Twenty-first Amendment withdrew some, but not all, of the power of Congress to regulate interstate commerce. *See id.* at 512-13. Citing this Court's decision in *Bacchus*, the court first considered whether the North Carolina statute would "violate[] the Commerce Clause without consideration of the Twenty-first Amendment." *Id.* at 513-14. The court concluded that there was "little doubt that those laws treat in-state manufacturers of wine differently from out-of-state manufacturers of wine, with the undoubted effect of benefiting the in-state manufacturers and burdening the out-of-state manufacturers." *Id.* at 515. The court added that North Carolina had various reasonable non-discriminatory alternatives, including requiring out-of-state wineries to establish an in-state presence and import their wine to that location. *See id.* at 515-16. Turning to the Twenty-first

Amendment, the court reasoned that North Carolina could not identify any Twenty-first Amendment interest that was served by its system of "selective deregulation." *Id.* at 517. The court therefore concluded that North Carolina's law "cannot credibly be portrayed as anything other than local economic boosterism in the guise of a law aimed at alcoholic beverage control." *Id.*

2. So too, in *Dickerson v. Bailey*, 336 F.3d 388 (5th Cir. 2003), the Fifth Circuit invalidated Texas' direct-shipping laws, which likewise unambiguously allowed in-state wineries but not out-of-state wineries to engage in direct shipping, *see id.* at 393. Like the Sixth Circuit in this case and the Fourth Circuit in *Beskind*, the Fifth Circuit began by analyzing the statute under the dormant Commerce Clause. *See id.* at 395-403. The court found that "[i]t is clear beyond peradventure" that the Texas statute had the effect of discriminating against out-of-state wineries, *id.* at 398, and added that there was substantial evidence that the direct-shipping exemption for in-state wineries was enacted with a discriminatory purpose, *see id.* at 399-400. The court reasoned that "the operable facts of this case are identical to those resulting in the Supreme Court's decision in *Bacchus*." *Id.* at 400. The court concluded that Texas had failed to demonstrate that alternative means were unavailable to achieve its policy goals. *See id.* at 401-02. As to the Twenty-first Amendment, the court stated that the appropriate inquiry, under *Bacchus*, was whether the statute furthered a "core concern" of the Twenty-first Amendment. *Id.* at 404. The court rejected Texas' argument that the Twenty-first Amendment required the Texas laws to be reviewed deferentially, reasoning that such a test was a "legal dinosaur that went extinct long ago in the history of the Supreme Court's Twenty-first Amendment jurisprudence." *Id.* at 406. Instead, citing this Court's decisions in *Bacchus*, *Brown-Forman*, and other cases, the court concluded that it was required to "scrutinize strictly whether a state's statutes are tailored to the Twenty-First Amendment's 'core concerns.'" *Id.* The court

concluded that Texas' laws were not. *Id.* at 406-07.

B. Petitioners contend that the first two circuits to have addressed the issue, the Seventh and Eleventh Circuits, reached conflicting results on the constitutionality of state direct-shipping laws. *See* 03-1116 Pet. 6-10; 03-1120 Pet. 12-15. Not so. Those decisions, and a more recent decision of the Second Circuit, can readily be reconciled with the Sixth Circuit's decision.

1. In *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000), the Seventh Circuit upheld Indiana's direct-shipping laws only after finding that they were not discriminatory, and its decision is therefore consistent with the decision below. Admittedly, the *Bridenbaugh* court began its analysis with the Twenty-first Amendment, rather than the dormant Commerce Clause. *Id.* at 851-53.[12] Like the Fourth, Fifth, and Sixth Circuits after it, however, the Seventh Circuit held that the Twenty-first Amendment could not be used to save a state law that discriminated against out-of-state sellers. Writing for the court, Judge Easterbrook reasoned that, under this Court's recent Twenty-first Amendment decisions, "the greater power to forbid imports does not imply a lesser power to allow imports on discriminatory terms." *Id.* at 853. The court noted that, in those decisions, this Court had "appl[ied] an

[12] The wholesalers contend that "[t]he Sixth Circuit explicitly disagreed with *Bridenbaugh*'s approach and its result." 03-1120 Pet. 12; *see generally* Ohio Br. 6-9 (suggesting that circuits are split because they have "applied a different legal test," with some starting their analysis with the dormant Commerce Clause and others with the Twenty-first Amendment). To be sure, the Sixth Circuit did chastise the Seventh Circuit for not fully addressing the dormant Commerce Clause issue, *see* 03-1116 Pet. 16a-17a; 03-1120 Pet. 15a-16a. This Court does not ordinarily grant certiorari, however, to resolve disagreements about the order in which constitutional arguments should be addressed—even if those disagreements are dressed up as disagreements about "the analytical framework to be employed." 03-1274 Br. for Private Respondents 9; *see also* 03-1274 Br. for State Respondents 4, 6, 8, 10 (same).

unconstitutional-conditions approach to the use of the § 2 power," "treat[ing] § 2 as eliminating economic discrimination against *in-state* commerce * * * without authorizing discrimination against *out-of-state* sellers." *Id.* (emphasis added). The court therefore concluded that "§ 2 enables a state to do to importation of liquor * * * what it chooses to do to internal sales of liquor, but nothing more." *Id.*

Although the Seventh Circuit did proceed to uphold Indiana's direct-shipping laws, it did so based on its reading of those laws, which it construed to require that "*every* drop of liquor pass through its three-tiered system and be subjected to taxation." *Id.* The court reasoned that Indiana law barred in-state and out-of-state sellers *alike* from engaging in direct shipping, as long as they also sold alcohol in other States, and added that such sellers could still engage in direct shipping simply by obtaining wholesaler permits. *Id.* at 853-54.[13] On that basis, the court concluded that there was no "functional discrimination" between out-of-state and in-state sellers. *Id.* at 853. Notably, both the Sixth Circuit in this case, *see* 03-1116 Pet. 16a-17a; 03-1120 Pet. 15a-17a, and the Fifth Circuit in *Dickerson*, *see* 336 F.3d at 400-01, distinguished *Bridenbaugh* factually, on the ground that it involved a different statutory scheme. Because *Bridenbaugh* adopted the conventional view of the Twenty-first Amendment, and because the statutory scheme at issue was found to be not discriminatory, *Bridenbaugh* does not conflict with the consistent line of later

[13] The wholesalers contend that the "*Bridenbaugh* opinion makes clear that Indiana, like Michigan, permitted 'local wineries but not [out-of-state] wineries * * * to ship directly to consumers.'" 03-1120 Pet. 12, 13 n.6 (quoting 227 F.3d at 851); *see also* 03-1274 Br. for Private Respondents 12 (same); *cf.* 03-1116 Pet. 8 (contending that "Michigan, in application of its shipping law, is the same as Indiana"). But that is not what *Bridenbaugh*, or the Indiana statute, says. *Bridenbaugh* actually says that Indiana permitted "local wineries, but not wineries *'in the business of selling * * * in another state or country,'* to ship directly" to Indiana consumers. *Id.* (quoting Ind. Code § 7.1-5-11-1.5(a)) (emphasis added).

decisions invalidating more plainly discriminatory direct-shipping laws.

2. In *Bainbridge v. Turner*, 311 F.3d 1104 (11th Cir. 2002), the Eleventh Circuit declined to reach a final decision on a challenge to Florida's direct-shipping laws, and its decision is thus consistent with the decision below. Florida's laws allowed in-state wineries but not out-of-state wineries to engage in direct shipping using their own vehicles (and, at least in practice, by common carrier). *See id.* at 1107 & n.5. Like the Fourth, Fifth, and Sixth Circuits, the Eleventh Circuit began by concluding that the statutory scheme discriminated against interstate commerce. *See id.* at 1108-11. The court reasoned that Florida's regulatory scheme discriminated on its face, and that Florida could adopt various non-discriminatory alternatives (including a requirement that out-of-state wineries obtain licenses). *See id.* at 1109-10.

The Eleventh Circuit then turned to the Twenty-first Amendment. *See id.* at 1111-15. Citing this Court's decision in *Healy*, the court reasoned that "the Amendment falls short of giving states free rein in regulating the importation of alcoholic beverages." *Id.* at 1112. The court concluded that, where a state law amounted to "mere economic protectionism" under *Bacchus*, the Twenty-first Amendment had no independent effect. *See id.* at 1112-13. To be sure, the court drew a distinction (in our view illusory, *see Bacchus*, 468 U.S. at 271) between laws that "amount to mere economic protectionism," on the one hand, and laws that "discriminate on their face," on the other, and suggested that the Twenty-first Amendment could affect the analysis in the latter instance if a State could show that the regulation is "genuinely need[ed]" to effectuate a "core concern" of the Twenty-first Amendment. *Bainbridge*, 311 F.3d at 1112-13 (internal quotation omitted). However, the court then remanded for factfinding on whether Florida's facially discriminatory law was needed to effectuate a core concern—though it rejected outright Florida's argument that the

law was necessary to protect minors, and expressed skepticism about the argument that the law was necessary to collect taxes. *See id.* at 1114-15. The Eleventh Circuit's decision in *Bainbridge* was therefore effectively interlocutory. Because the district court may ultimately conclude, like the Fourth, Fifth, and Sixth Circuits, that the State's justifications for its discriminatory regulatory scheme are insufficient, the Eleventh Circuit does not presently stand in conflict with those circuits.[14]

3. Finally, in *Swedenburg v. Kelly*, 358 F.3d 223 (2d Cir. 2004), the Second Circuit upheld New York's regulatory scheme only after determining that it was not discriminatory, and that decision thus does not conflict with the decision below. Critically, New York's regulatory scheme allowed out-of-state wineries to obtain direct-shipping licenses, provided that they paid a license fee and established a physical presence in the State by "maintain[ing] a branch factory, office, or storeroom within the state." N.Y. Alco. Bev. Cont. Law §§ 3(37), 76(4), 77(2). The Second Circuit expressly distinguished the New York statutory scheme from the ones before the Fourth, Fifth, and Eleventh Circuits, and before the Sixth Circuit *in this case*. *See Swedenburg*, 358 F.3d at 229 n.3.[15]

Like the Seventh Circuit, the Second Circuit began its constitutional analysis not with the dormant Commerce Clause, but rather with the Twenty-first Amendment. *See id.* at 230.

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[14] Admittedly, as the petitioners note, *see* 03-1116 Pet. 9; 03-1120 Pet. 13, the Eleventh Circuit did suggest, in a short footnote, that the district court should apply something less than strict scrutiny to the State's justifications on remand, *see Bainbridge*, 311 F.3d at 1114 n.17. To the extent that this standard of review is more deferential than the standard adopted by other circuits, however, that difference does not justify this Court's review—especially since the district court may yet reach the same result as those other circuits even under that apparently more deferential standard.

[15] The Second Circuit's opinion, like the Seventh Circuit's in *Bridenbaugh*, therefore belies the (unelaborated) claim of *amici* that the regulatory scheme at issue was "virtually identical" to Michigan's. Ohio Br. 4; NABCA Br. 7.

Although the court expressed its disagreement with those circuits that chose to begin with the dormant Commerce Clause, it stated that it "need not assess the other circuits' determinations, as the statutes challenged in those cases were *significantly different* from the regulatory regime at issue here." *Id.* at 231 n.7 (emphasis added). The court noted, moreover, that the Fourth Circuit had suggested that a "presence" requirement, like that imposed by New York law, could constitute a possible non-discriminatory alternative to an outright ban on direct shipping by out-of-state wineries. *See id.*

The court then considered the Twenty-first Amendment, tracing its history and this Court's decisions construing it. *See id.* at 230-37. Although the court seemed to give section 2 of the Twenty-first Amendment a robust construction, *see id.* at 236-37, the court ultimately conceded that protectionist laws were not entitled to the same degree of deference under section 2, *see id.* Crucially, the court found that there was "no indication, based on the facts presented here, that the regulatory scheme is intended to favor local interests over out-of-state interests," on the ground that "[a]ll wineries, whether in-state or out-of-state, are permitted to obtain a license as long as the winery establishes a physical presence in the state." *Id.* at 237. The court therefore concluded that the New York regulatory scheme allowed direct shipping "in a non-discriminatory manner." *Id.* at 239. Because New York's statutory scheme, like Indiana's, was found to be non-discriminatory, the Second Circuit's decision, like the Seventh Circuit's in *Bridenbaugh*, does not conflict with the decision below.

III. THIS CASE IS A LESS THAN IDEAL VEHICLE FOR CONSIDERATION OF THE UNDERLYING CONSTITUTIONAL QUESTION.

Even if this Court were to conclude that the Sixth Circuit's decision was inconsistent with decisions of this Court or other circuits, this case presents a less than ideal vehicle for consideration of the underlying constitutional question.

1. The primary problem with this case is that it does not present the logically subsequent question whether, if a state direct-shipping law is held to be unconstitutional, the appropriate *remedy* for the constitutional violation is to allow direct shipping by out-of-state wineries or to ban direct shipping by in-state wineries. The district court did not have occasion to reach the remedy question because it upheld the Michigan direct-shipping scheme. Before the Sixth Circuit, none of the parties briefed the question of the appropriate remedy, and the court of appeals opted merely to reverse the district court's decision on the merits and remand for entry of judgment in favor of the plaintiffs. *See* 03-1116 Pet. 18a, 20a; 03-1120 Pet. 17a, 20a. Thus, far from "effectively granting the plaintiffs the relief requested," *id.* at 5, or somehow advantaging out-of-state wineries over in-state wineries, *id.* at 6, the court of appeals was entirely silent on the issue of the appropriate remedy, leaving the issue to the district court on remand and thereby postponing its own consideration of the issue.

While the courts of appeals have addressed the *constitutionality* of state direct-shipping laws in a consistent manner, they have reached conflicting results on the appropriate *remedy* for a constitutional violation. *Compare Dickerson*, 336 F.3d at 407-09 (allowing direct shipping by out-of-state wineries), *with Beskind*, 325 F.3d at 517-20 (prohibiting direct shipping by in-state wineries). Although those decisions turn to some extent on the structure of the state regulatory scheme, *see, e.g.*, *id.* at 519, they also present a broader question whether extending benefits to disadvantaged parties or imposing burdens on advantaged parties is the more appropriate remedy for dormant Commerce Clause violations more generally, *see, e.g.*, *Dickerson*, 336 F.3d at 407-08. And by claiming (albeit erroneously) that the Sixth Circuit's decision conflicts with the Fourth Circuit's decision in *Beskind* on the issue of the appropriate remedy, petitioners themselves implicitly concede that the remedy issue is independently worthy of this Court's

consideration. *See, e.g.*, 03-1116 Pet. 13-14; 03-1120 Pet. 13-14. This Court should therefore wait for a case that presents not only the constitutional question, but also the remedial one.[16]

2. Since the petitions in this case were filed, plaintiffs in the New York direct-shipping litigation have also filed a petition for certiorari from the Second Circuit's decision. *See Swedenburg v. Kelly*, No. 03-1274 (petition filed Mar. 8, 2004). That petition should be denied for the same reasons as the petitions in this case, and for some additional ones. As the Second Circuit itself recognized, *Swedenburg* involves an unusual statutory scheme, in which out-of-state wineries *can* engage in direct shipping provided they establish a "physical presence" within the State. *See, e.g.*, 358 F.3d at 229 n.3, 231 n.7.[17] And by virtue of its holding that the New York regulatory

[16] In a quixotic detour, Michigan suggests that this case would be a particularly *good* vehicle for this Court's consideration because it involves a facial challenge. *See* 03-1116 Pet. 18-21. The Sixth Circuit, however, held only that the Michigan *regulatory* scheme, as construed and applied by the Michigan Liquor Control Commission, was facially, or plainly, *discriminatory*—not that plaintiffs were bringing only a facial (as opposed to an as-applied) challenge to the Michigan *statutory* scheme. *See, e.g.*, 03-1116 Pet. 15a; 03-1120 Pet. 14a. It is clear from the complaint that the plaintiffs were bringing both. *See, e.g.*, C.A. App. 21.

[17] The petitioners in *Swedenburg* suggest that New York law does *not* allow out-of-state wineries to engage in direct shipping if they establish a mere "physical presence" in the State, but allows them to do so only if they actually open a *winery* in the State. *See, e.g.*, 03-1274 Pet. 2-3, 15-16. To the extent that there is any ambiguity on the threshold factual question of what New York law actually requires (and thus on the legal question of whether New York law is discriminatory), such ambiguity counsels against, not in favor of, the granting of certiorari—as the plaintiffs in *Swedenburg* themselves contended in *opposing* certiorari from the Seventh Circuit's decision in *Bridenbaugh*. *See* 00-1323 Br. of *Amici* David Lucas and Juanita Swedenburg 5-6. In any event, the better reading of New York law is that it does allow direct shipping upon the establishment of a "physical presence" in the State. *See* N.Y. Alco. Bev. Cont. Law §§ 3(37), 76(4), 77(2). Notably, the respondents in *Swedenburg* have acknowledged that New York's regulatory scheme is "meaningfully different" from Michigan's, 03-

scheme was constitutional, the Second Circuit, like the Sixth Circuit, did not reach the remedial issue at all.[18]

Moreover, *Swedenburg* may shortly be rendered moot by pending legislation that would allow direct shipping by out-of-state wineries in States that have reciprocal laws.[19] While the governor of New York previously vetoed a similar bill after it was passed by the New York legislature, *see Swedenburg*, 358 F.3d at 239, the governor recently reversed course and included the proposed legislation in his most recent state budget proposal, *see, e.g.*, Marc Humbert, *Wineries Cheer Proposal for Direct Shipping*, Albany Times Union, Jan. 23, 2004, at B3. Notably, the staff of the Federal Trade Commission has expressed its support for the proposed legislation in a letter to leading members of the New York legislature. *See* Letter from Todd J. Zywicki *et al.* to William Magee *et al.* (Mar. 29, 2004), *available at* http://www.ftc.gov/opa/2004/03/nywine.htm. Because of this pending legislation, and because of the peculiar nature of the regulatory scheme being challenged, the petition in *Swedenburg* should be denied in any event.[20]

1274 Br. for State Respondents 8; *see also* 03-1274 Br. for Private Respondents 7-8 (same), and have added that "[t]hat factor may be significant in this Court's analysis," *id.* at 8 n.3, and indeed "perhaps dispositive," 03-1274 Br. for State Respondents 7.

[18] Should the Court choose to grant certiorari despite the absence of the remedial issue in either of these cases, the Sixth Circuit case presents a considerably better vehicle because it involves the more common regulatory scheme in which out-of-state wineries are prohibited outright from engaging in direct shipping. *See* Ohio Br. 10 (stating that "Michigan's law provides a perfect example of typical State efforts to regulate alcohol shipments"). In that event, the Court should grant certiorari on the two instant petitions, and hold the petition in *Swedenburg*.

[19] Astonishingly, the state respondents in *Swedenburg* suggest that the possibility that the case will be mooted should have no bearing on this Court's decision as to whether to add the case to its calendar. *See* 03-1274 Br. for State Respondents 20 n.6.

[20] The petitioners in *Swedenburg* contend that their case would be a

3. To the extent that this Court were to conclude that these cases present potentially certworthy issues, the Court can afford to wait for a better vehicle for their consideration. As petitioners concede, *see, e.g.*, 03-1120 Pet. 15 n.8, numerous other challenges to direct-shipping laws are currently pending in the federal courts—including the challenge to Florida's direct-shipping laws, which is still pending before the district court on remand, *see Bainbridge v. Turner*, No. 99-CV-2681 (M.D. Fla.). Our understanding is that litigation is being actively considered in other jurisdictions as well. And many States are not waiting for their laws to be invalidated, but are instead amending them in response to the outcry from consumers and wineries alike. Should a genuine circuit split arise on the constitutionality of state direct-shipping laws, this Court can act then. There is no need for it to weigh in now—or to weigh in here. These cases are more like a 2000 Bordeaux than a 1961. All of the pending petitions for certiorari should be denied.

CONCLUSION

For the foregoing reasons, this Court should deny the petitions for certiorari. In the alternative, in light of the FTC's position on the direct shipment of wine, and the regulatory interests of the Alcohol and Tobacco Tax and Trade Bureau and other federal agencies, the Court may wish to call for the views of the Solicitor General.

Respectfully submitted,

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particularly good vehicle because plaintiffs challenged the New York regulatory scheme under both the dormant Commerce Clause and the Privileges and Immunities Clause of Article IV. *See* 03-1274 Pet. 24-27. Petitioners do not contend, however, that there is a circuit split on the question whether state direct-shipping laws violate the Privileges and Immunities Clause, and the Second Circuit (operating on the premise that New York law allowed direct shipping by out-of-state wineries provided they established a "physical presence" within the State) summarily rejected petitioners' argument. *See Swedenburg*, 358 F.3d at 239.

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No. 03-1116

In The Supreme Court of the United States

JENNIFER M. GRANHOLM, Governor; et al.,

Petitioners,

and

MICHIGAN BEER AND WINE WHOLESALERS ASSOCIATION,

Respondent,

v.

ELEANOR HEALD, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

Respondents' Brief in Opposition claims that Michigan's Petition is not the proper vehicle to resolve the constitutional questions presented. That claim, however, is not shared by thirty-six States which, through their Attorneys General, have filed an *amici* brief urging that certiorari be granted to resolve the split of authority and to give guidance as to how States can structure their alcohol beverage distribution systems. *See* 03-1116, Ohio and 35 Other States *Amici* Br. at 20. Respondents' opinion is also not shared by State alcohol beverage regulators who, through their associations, have urged the granting of certiorari. *See* 03-1116 and 03-1120, NABCA & NCSLA *Amici* Br. at 1-2.

In Respondents' effort to achieve denial of certiorari, they claim that the Petition before this Court merely presents an "interesting" and "novel" constitutional question. Respondents' Brief in Opposition, p. 1. Respondents describe the state of the law before this Court as "more like a 2000 Bordeaux than a 1961." *Id.* at 30. However, the interplay between the dormant Commerce Clause and the 21st Amendment is a question that has caused considerable litigation and appellate review in the country since prohibition was repealed by the 21st Amendment in 1933.[1] The Petitions present constitutional questions that have resulted in a dramatic split of authority among the six federal circuit courts that have addressed the issues (2nd, 4th, 5th, 6th, 7th and 11th).

I. Most recently (and since the filing of this Petition), the Second Circuit issued an opinion upholding New York's ban on direct shipping of wine to consumers by out-of-state distributors, declaring that the State laws are permissible exercises of the State's authority under the 21st Amendment.

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[1] *Smokey and the Bandit in Cyberspace*, Brannon P. Denning, West Law, 19 Const. Comment 297, 2002, pp. 1-2.

Swedenburg v. Kelly, 358 F.3d 223 (2nd Cir. 2004). New York's law was upheld as constitutional despite its law allowing in-state wineries the right to direct ship.

By unanimous decision from a panel of three judges of the Second Circuit, the two-step Commerce Clause and 21st Amendment analytical framework utilized by the Fourth, Fifth, Sixth and Eleventh Circuit Court of Appeals was rejected.[2] That rejected framework first calls for examining a State's ban on out-of-state direct shipment of alcoholic beverages under the dormant Commerce Clause. If the State statutory scheme is determined to facially discriminate between out-of-state and in-state wineries in violation of the dormant Commerce Clause, it is almost always *per se* invalid. *Theoretically*, it can be saved by the 21st Amendment, "but only if it advances one of the Amendment's 'core concerns.'" *Id.* at 231.

Instead, the Second Circuit applied a plain reading interpretation to the 21st Amendment recognizing that this Court has consistently held that "a state may regulate the importation of alcohol for distribution and use within its borders, but may not intrude upon federal authority to regulate beyond the state's borders or to preserve fundamental rights." *Id.* at 233.[3] The Second Circuit's decision is consistent with the Seventh Circuit's decision in *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000).

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[2] *Heald v. Engler*, 342 F.3d 517 (6th Cir. 2003); *Dickerson v. Bailey*, 336 F.3d 388 (5th Cir. 2003); *Beskind v. Easley*, 325 F.3d 506 (4th Cir. 2003); *Bainbridge v. Turner*, 311 F.3d 1104 (11th Cir. 2002).

[3] *Swedenburg's* Petition for Certiorari to review the Second Circuit's decision is pending with this Court. *Swedenburg v. Kelly* (No. 03-1274). New York's response to that petition is that certiorari should be granted on the issue of whether New York's ban on direct shipment of alcoholic beverages by unlicensed out-of-state wineries is within the powers conferred by the 21st Amendment. 03-1274, Respondents' Brief, p. 23. New York requests that the petitions in this case and theirs be jointly granted. *Id.* at 7.

Now that six federal appellate circuits have reached differing conclusions as to the standard of deference to be given State alcohol beverage importation laws, the merits of the constitutional questions, and the remedy where importation laws are found unconstitutional, the time is ripe for a ruling by this Court.[4]

II. The issues have been framed and guidance is needed now. *See*, e.g., *Bainbridge*, 311 F.3d at 1112 referring to the interplay between the 21st Amendment and the Commerce Clause as a never-never land and opining (at 1113, n. 14) that "[t]he Supreme Court cases are confusing because many of them implicate different issues and, at the same time, borrow quotations from one another." *See* also *Heald* at App. 11a, noting that "[s]ince *Bacchus* the Supreme Court has been less than prolific in construing the content of the Twenty-first Amendment's core concerns."

III. Respondents assert that because there are other pending cases at the district court level, this Court should not consider the issues now even though six circuit courts have already considered and ruled on the issues. Respondents' Brief in Opposition at p. 30. Respondents neglect to mention that either their counsel of record in this case or the counsel of record for Petitioners in *Swedenburg* are (or were) involved in five of the six cases decided by the circuit courts (the one exception being *Dickerson)* and in every one of the district

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[4] On the merits *Heald* (6th), *Dickerson* (5th), *Beskind* (4th), *supra*, use a dormant Commerce Clause analysis to strike down the out-of-state direct shipment bans, but *Bridenbaugh* (7th) and *Swedenburg* (2nd) *supra*, uphold the laws under the 21st Amendment. *Bainbridge* (11th) differs from *Heald, Dickerson*, and *Beskind* by giving greater deference to State regulation of alcoholic beverages and did not require the State to show no nondiscriminatory alternatives available. *Beskind* (struck the in-state direct shipment exemption) and *Dickerson* (struck the out-of-state direct shipment ban) differ on the remedy to be applied when a dormant Commerce Clause violation has been found.

court actions referred to at 03-1120 Pet. 15 n. 8. *See* Respondents' Brief in Opposition p. 30. Therefore, not only do this case and *Swedenburg* neatly present the split of authority, but they involve counsel who have represented almost all of the plaintiffs in the cases through which the split has developed and who have largely orchestrated the challenges to State regulation of importation of alcoholic beverages.

While Respondents are apparently willing to accept continued uncertainty and confusion as to the state of the law, that is not fair to the States or their citizens, legislatures and regulators who need certainty. *See* 03-1116 Ohio and 35 Other States *Amici* Br. at 1 ("The *amici* States all have a strong interest in the resolution of this issue, as every State regulates in some manner the direct shipment of alcohol to its residents.") and 03-1116, 03-1120 NABCA & NCSLA *Amici* Br. at 10 ("A clear mandate from this Court is needed to avoid further inconsistency and conflict.").

IV. Respondents' brief is simply wrong when it asserts that there is no split of authority and that all six Court of Appeals decisions can be reconciled. Clearly, this case is inconsistent with the decisions in *Bridenbaugh* and *Swedenburg* (on the merits), and the decisions in *Bainbridge* (as to the burden of proof) and *Beskind* (as to remedy).[5]

For example, the Indiana statutory scheme at issue in *Bridenbaugh* is for practical purposes indistinguishable from Michigan's scheme. Both Michigan and Indiana allow in-state

[5] There is clearly a circuit split on the appropriate remedy where a dormant Commerce Clause violation is found, compare *Beskind, supra* (striking the in-state exemption) with *Dickerson, supra* (striking the ban on importation). In this case, the Sixth Circuit granted "final" judgment to the respondents; therefore, this case squarely presents the issue of the appropriate remedy in light of the 21st Amendment – an issue that was raised with the Sixth Circuit by the State. *See,* e.g., State's Petition for Rehearing *En Banc,* p. 2, 5, and 14.

licensed wineries to directly ship alcoholic beverages to their state residents, but prohibit out-of-state wineries from doing so. *Bridenbaugh* clearly recognized this fact when it acknowledged that Indiana permits "local [Indiana] wineries, but not wineries in the business of selling . . . in another state or country, to ship directly to Indiana consumers." *Bridenbaugh,* 227 F.3d at 849.

Apparently Respondents would give the quoted Indiana statute a different and uncalled-for reading to say that both in-state and out-of-state wineries, which sell in other states, are barred from direct shipping to Indiana consumers. However, the Indiana statute does not say that. In fact, the attorney of record for Respondents was also counsel for the plaintiffs in *Bridenbaugh* and pointed out to the *Bridenbaugh* court that he understood that local wineries could ship to Indiana consumers, but out-of state wineries could not. *See* Plaintiffs CA 7 Br. 3, 5. In this regard the *Bridenbaugh* plaintiffs stated (CA 7 Br. at 5):

> Indiana law prohibits any person in the business of selling alcoholic beverages in another state from shipping wine directly to an Indiana resident. *The prohibition applies only to out-of-state businesses. Indiana* wholesalers, retailers and *small wineries are allowed to make such direct shipments to consumers' homes.* [emphasis added.]

There simply is no principled way to distinguish *Bridenbaugh* from this case, despite the attempts made by the Sixth Circuit and Respondents.

V. Even though there are some differences between the statutory schemes at issue here and in *Swedenburg,* there is nothing in Michigan's statutory scheme that would warrant a different constitutional result than that reached by the

Swedenburg Court.[6] A close reading of *Swedenburg* demonstrates that the case did not turn on the uniqueness of the New York statutory scheme, but rather on the inherent power delegated to the States by the 21st Amendment. The reasoning and analytical framework of that court's decision, with its recognition of the plain language of the 21st Amendment, would uphold a statutory scheme like that at issue here.[7] New York's law barring direct shipment by firms without an in-state presence "falls squarely within the ambit" of that authority. *Swedenburg*, 358 F.3d at 237. The same result should be reached in this case.

Like New York, Michigan generally requires all sales and direct shipment of beverage alcohol to be by licensed in-state regulated retailers that have a presence in the state. MCL 436.1203(1); 1113(9).[8] In a well-reasoned opinion, the *Swedenburg* panel traced the history and intent behind the 21st Amendment dating back to the pre-prohibition era. *Swedenburg, supra* at pp. 232-233. It noted the States' early struggles with regulating alcoholic liquor imported into their territories when the dormant Commerce Clause was used to strike down such regulations. The Second Circuit recognized that with passage of the Wilson and Webb-Kenyon Acts in

[6] The petitioners in *Swedenburg*, for example, assert that there is no "meaningful dissimilarity between New York's regulatory scheme and those struck down in Michigan." *See Swedenburg*, 03-1274 Pet. at 18.

[7] *See Swedenburg*, 358 F.3d at 233, where it held that the Twenty-first Amendment "should not . . . be subordinated to the dormant Commerce Clause and where the Court noted that a state's power to regulate the physical importation of alcohol is defined by the 21st amendment's "plain language." U.S. Const. amend. XXI, § 2.

[8] Respondents claim that the State did not make the argument to the Sixth Circuit that "[a]ny qualified out-of-state manufacturer may establish a physical presence in Michigan and be licensed in Michigan as a wine maker." Respondents' Brief in Opposition, p. 4, n. 1. This, of course, is not accurate as the State did in fact make this representation and argument to the Sixth Circuit. *See* CA 6 (01-2720), State Appellee's brief, pp. 40-41; State's Petition for Rehearing *En Banc*, pp. 8-9.

1890 and 1913, Congress reacted to the States' frustration with regulating the importation of beverage alcohol when such regulations were challenged under the Commerce Clause. Those statutes intended to give States the authority to regulate "imported alcohol in the same manner as domestically produced alcohol." *Id.* at 232. Passage of the 21st Amendment repealing prohibition in 1933 did not return the Constitution to its pre-prohibition form. "Section 2 . . . constitutionalizes most state prohibitions regulating importation, transportation, and distribution of alcoholic beverages from the stream of interstate commerce into the state." *Id.*

Citing the decision from the Seventh Circuit in *Bridenbaugh*, 227 F.3d at 853, the Second Circuit found that "*section* 2 speaks directly to the importation of liquor into the state [and] dormant Commerce Clause jurisprudence could no longer be employed to insulate interstate shipments of liquor from state regulation, as almost 'every use of § 2 could be called "discriminatory" in the sense that . . . every statute limiting [interstate] importation leaves intrastate commerce unaffected.'" *Id.* at 232-233. The *Swedenburg* Court noted: "Allowing dormant *Commerce Clause* concerns to restrict state regulatory schemes that focus on the importation of liquor would render *section* 2 a nullity." *Id.* at 233.

In summarizing early 21st Amendment case law of this Court, the Second Circuit correctly found that those cases established "that section 2 provided the states with the authority to enact legislation for the regulation of alcohol traffic within its borders, even where those regulations operated to the disadvantage of out-of-state interests." *Id.* at 234. The Second Circuit noted that some courts have distanced themselves from these early Supreme Court cases but "they have never been overruled." *Id.* at 234. It is recognized in the *Swedenburg* decision that section 2 gives "States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *Id.*

at 233. The Court declared "the drafters of the *Twenty-first Amendment* crafted *section 2* to allow states the authority to circumvent dormant *Commerce Clause* protections, provided that they were regulating the intrastate flow of alcohol." *Id.* at 237.

Accordingly, the Second Circuit upheld the New York law as constitutional under the powers granted to it by the 21st Amendment to regulate the importation and distribution of beverage alcohol. *Id.* at 239. It found that the New York scheme operated in a non-discriminatory manner because it targeted valid state interests in controlling the importation and transportation of alcohol. *Id.*

VI. Respondents also claim that the Sixth Circuit decision "held only that the Michigan *regulatory* scheme, as construed and applied by the Michigan Liquor Control Commission, was facially, or plainly, *discriminatory-not* that plaintiffs were bringing only a facial challenge." Respondents' Brief in Opposition, p. 28, n. 16. However, there is no question that the Sixth Circuit found Michigan's statutory provisions unconstitutional on their face without according proper deference to them (the Court did not apply the "no set of circumstances test") and that such a finding was dispositive. *Heald,* 342 F.3d at 524-525. App. 13a-14a.[9] *See Coleman v. Dewitt,* 282 F.3d 908, 914 (6th Cir. 2002), *cert. denied* 536 U.S. 914 (2002).

[9] The Sixth Circuit stated in pertinent part:

> In reviewing challenges brought under the Commerce Clause, the Supreme Court has long held that statutes that facially discriminate are "virtually per se invalid." *Id.* at p. 524. Apx. 13a.
>
> Having determined that *the provision is facially discriminatory* [Apparently referring to MCL 436.1113(9)], we now turn to the question of whether the regulatory scheme is nevertheless constitutional. . . . *Id.* at p. 525. Apx. 6a, 15a. (emphasis added).

VII. Finally, Respondents rely upon a Federal Trade Commission (FTC) report from staff of that agency for the proposition that Michigan should allow out-of-state direct shipments because other States that have done so report "few or no problems with shipments to minors or with tax collection." Respondents' Brief in Opposition, p. 19. This report, however, is of very questionable credibility. *FTC Report* at 2.

The FTC Report itself does not directly support Respondents' arguments with any type of independent research or findings. The report "does not focus on the merits of the tax debate. . . ." *See* http://www.ftc.gov/opa/2003/07/wine.htm. The report relies on a self-serving statement by the Wine Institute (a trade association of pro-direct shipment interests) that its members will comply with the law and pay taxes. *FTC Report* at 39-40.

A new National Academy of Sciences (NAS) study discredits the report in noting that the problem of Internet alcohol purchases is so serious that an argument can be made that banning Internet and home delivery sales altogether is warranted in light of the likelihood that these methods will be used by underage purchasers. *Reducing Underage Drinking, A Collective Responsibility,* Bonnie R. & O'Connel, M. (eds) at 174 (2003).[10] The NAS report found that underage alcohol use costs the nation an estimated $53 billion annually, including $19 billion from traffic crashes and $29 billion from violent crime. *Id.* at 1. "Limiting youth access to alcohol has been shown to be effective in reducing and preventing underage drinking and drinking-related problems." *Id.* at 6. "Many Internet sites sponsored by alcohol companies are easy for

[10] Read on line http://www.nap.edu/books/0309089352/html/.

children to access" and do not require age verification. *Id.* at 142.[11]

CONCLUSION

The reasons for granting certiorari in this case to resolve the substantial split of federal authority over the interplay between the 21st Amendment and the dormant Commerce Clause have crystallized with the issuance of the *Swedenburg* decision. This Court should reject Respondents' attempt to downplay the obvious split of authority. The questions presented are of obvious nationwide importance. There is clear and immediate need for guidance from this Court. Certiorari should be granted.

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April, 2004

[11] Michigan presented evidence on the record of prosecutions for illegal out-of-state direct shipments to minors; surveys showing the problem with underage drinking at State colleges and the widespread use of the Internet for ordering alcohol; studies submitted by the *Amicus* Michigan Interfaith Council on Alcohol Problems and the *Amicus* State Universities demonstrating the widespread marketing of alcohol to minors. (CA 6, 01-2720, Apx., Vol. 2, pp. 448-473).

(2) (2)

No. 03-1116, No. 03-1120

IN THE

Supreme Court of the United States

JENNIFER M. GRANHOLM, Governor, *et al.*,
Petitioner,

v.

ELEANOR HEALD, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE NATIONAL ALCOHOL BEVERAGE CONTROL ASSOCIATION AND THE NATIONAL CONFERENCE OF STATE LIQUOR ADMINISTRATORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Did the Sixth Circuit err in ruling, contrary to decisions by the Second Circuit and Seventh Circuit in similar cases, that a State cannot prohibit the shipment of alcohol beverages from out-of-state producers directly to in-state consumers pursuant to the provisions of the Twenty-First Amendment and the Webb-Kenyon Act, 27 USC §122, while allowing in-state producers to ship directly to consumers?

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Pursuant to Rule 37 of the Rules of this Court, the National Alcohol Beverage Control Association (NABCA) and the National Conference of State Liquor Administrators (NCSLA), by their attorney, file this brief as *amici curiae* supporting the position of the Petitioners and respectfully urge this Court

[1] Counsel of record for the *amici curiae* was the sole author of this brief. No person or organization other than the *amici curiae* have made a monetary contribution to the preparation or submission of this brief.

to overturn the judgment of the United States Court of Appeals for the Sixth Circuit in *Heald v. Engler*, 342 F.3d 517 (6th Cir. 2003). This brief is filed with the consent of the parties, evidence of which is submitted with this brief.

INTEREST OF *AMICI CURIAE*

NABCA is a Wyoming non-profit corporation whose members are the alcohol beverage regulatory agencies in the 18 states (Alabama, Idaho, Iowa, Maine, Michigan, Mississippi, Montana, New Hampshire, North Carolina, Ohio, Oregon, Pennsylvania, Utah, Vermont, Virginia, Washington, West Virginia and Wyoming) that directly control the distribution and sale of alcohol beverages within their borders by means of government-operated wholesale and, in some cases, retail outlets. In addition to the enumerated states, Montgomery County, Maryland is an Active Member of NABCA and the North Carolina Association of ABC Boards and Worcester County, Maryland are Participating Members. These jurisdictions are commonly referred to as "control" jurisdictions.

NABCA member agencies also perform licensing and regulatory functions with regard to private alcohol beverage distribution channels within their jurisdiction. Additionally, these agencies are responsible for the enforcement of laws pertaining to alcohol beverage distribution in the private sector.

NCSLA is an unincorporated organization which represents the remaining 32 states, often called "open" or "license" states. In these jurisdictions, the state government acts only in a licensing, regulatory and/or enforcement capacity, having chosen, pursuant to the Twenty-First Amendment to the U.S. Constitution, to permit the distribution of alcohol beverages to be accomplished entirely by the private sector.

Thus, together, the NABCA and NCSLA member jurisdictions represent all 50 states.

Because statutes similar to the one implicated in the instant case is or has been the subject of litigation in nearly a dozen states across the country and because alcohol beverage regulation has largely been a matter for state, rather than federal government control, the *amici* have a great interest in the outcome of this matter.

STATEMENT OF THE CASE

Alcohol beverages constitute one of the most highly regulated lawful commodities available in commerce. The American experience with this product includes a history of taxation and regulation dating back to colonial times. With few exceptions—the federal excise tax and the failed experiment of national Prohibition being the prime examples—the regulation of alcohol beverages has taken place at the state level.

The mix of state regulation was recognized as a problem for interstate commerce more than a century ago when Congress adopted the so-called Wilson Act, sometimes referred to as the "Original Packages Act."[2] This law had its flaws, however, and Congress subsequently adopted the Webb-Kenyon Act, which specifically divested alcohol beverages of their interstate commerce protection where the interstate shipment occurred in violation of state laws.[3]

A few years later, the Eighteenth Amendment to the Constitution was ratified, launching a lengthy, but eventually unsuccessful effort at creating a "dry" nation, one totally free of the distribution and sale of alcohol beverages. When the effort failed after a dozen years, Congress adopted and the states ratified the Twenty-First Amendment. This enactment not only repealed the Eighteenth Amendment, but it also, in Section 2,

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[2] 27 USC §121

[3] The Act of Mar. 1, 1913, c. 90, was entitled "An Act divesting intoxicating liquors of their interstate character in certain cases."

declared a clear national policy to carve out an exception to normal Commerce Clause jurisprudence:

> The transportation or importation into any State. . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

And, so there would be no mistake about its intent, following ratification of the Twenty-First Amendment, Congress re-enacted the Webb-Kenyon Act in 1935.[4] The language of that Act, for all practical purposes, is identical to Section 2.

It is against this backdrop that the Sixth Circuit, in the instant case, held that Michigan's statutory provisions treat out-of-state and in-state wineries differently and that the differential treatment did not fall within the so-called "core powers" reserved to the state under the Twenty-First Amendment.

SUMMARY OF ARGUMENT

NABCA and NCSLA believe that the Sixth Circuit's decision was in error and that this Court should review and ultimately overturn the decision because it ignores the plain language of the Twenty-First Amendment, because it conflicts with a lengthy series of decisions of this Court, because it conflicts with decisions of other circuits in similar cases, and, finally, because the issue is of significant national importance to the alcohol beverage regulatory scheme of the several states.

I. THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH THE PLAIN LANGUAGE OF THE TWENTY-FIRST AMENDMENT AND THE WEBB-KENYON ACT AS WELL AS DECISIONS OF THIS COURT.

The Sixth Circuit's approach was to apply a "traditional" dormant Commerce Clause analysis and, if the state's

[4] The Act now appears at 27 U.S.C.§ 122.

provisions were found to be unconstitutional, to then determine if they were somehow "saved" by application of the Twenty-First Amendment. NABCA and NCSLA believe that this approach is in error.

As indicated, the plain language of Section 2 of the Twenty-First Amendment could not be clearer with regard to Congressional intent. Nowhere does Section 2, or the Webb-Kenyon Act, which was adopted under Congress' Commerce Clause authority and which both predated and subsequently reaffirmed Section 2, state that the importation of alcohol beverages must comply only with those state laws that treat in-state products in a like manner to the way out-of-state products are treated.

Indeed, this Court has consistently recognized the significance of this language. In one of its earliest pronouncements on the subject, this Court held

> The Twenty-First Amendment sanctions the right of a state to legislate concerning intoxicating liquors brought from without, unfettered by the Commerce Clause. Without doubt a state may absolutely prohibit the manufacture of intoxicants, their transportation, sale, or possession, irrespective of when or where produced or obtained, or the use to which they are to be put.

Ziffrin, Inc. v. Reeves, 308 U.S. 132, 138 (1939)

The Court went on to conclude the greater power to prohibit transportation also includes the lesser power to permit such transportation only under definitely prescribed conditions. "The state may protect her people against evil incident to intoxicants and it may exercise large discretion as to means employed," this Court flatly declared. *Ibid.*, at 138.

In *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964), in which this Court set out a principle of accommodating the Twenty-First Amendment with the Commerce Clause, this Court nevertheless stated that had a

state sought to regulate or control the transportation of the liquor into its jurisdiction until its delivery into another jurisdiction (in this case, a national park), the state "would have been constitutionally permitted to do so."

In *California Retail Liquor Dealers Assn. v. Midcal Aluminum*, 445 U.S. 97 (1980), this Court set out a balancing test between the Twenty-First Amendment and the Commerce Clause, but noted that the test applies only to regulations other than whether to permit importation or sale of liquor and how to structure the liquor distribution system.

Less than a decade later, in *North Dakota v. U.S.*, 495 U.S. 423 (1989), this Court cited *Midcal* in again asserting that states have "virtually complete control" over the importation and sale of liquor and the structure of the distribution system within their jurisdictions.

And, finally, in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), the last instance in which this Court has reviewed the Twenty-First Amendment, this Court once again declared that the Amendment delegated to the states the power "to prohibit commerce in" alcohol beverages.

Thus, put quite simply, the Sixth Circuit misapplied the law in this case and departed from the settled interpretations of this Court with regard to the importation of alcohol beverages. While a Commerce Clause analysis may have a place with regard to "other regulations," NABCA and NCSLA submit that it has no place in consideration of state laws which regulate, or even prohibit the importation of alcohol beverages.

II. THE SIXTH CIRCUIT DECISION CONFLICTS WITH DECISIONS OF THE SECOND AND SEVENTH CIRCUITS CONCERNING A REGULATORY SCHEME THAT IS VIRTUALLY IDENTICAL TO THE ONE IN THE INSTANT CASE.

As further rationale as to why this Court should review the Sixth Circuit's decision, NABCA and NCSLA note that it conflicts squarely with a unanimous decision of the Seventh Circuit in a case involving virtually the same regulatory scheme. *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000), cert. denied sub nom. *Bridenbaugh v. Carter*, 532 U.S. 1002 (2001).

In that case, Judge Easterbrook wrote that Indiana's ban on direct shipments of wine from outside the state to consumers within the state was a valid exercise of Indiana's plenary power under the Twenty-First Amendment, which, he noted, directly authorizes states to "control alcohol in ways that it cannot control cheese."

> No longer may the dormant commerce clause be read to protect interstate shipments of liquor from regulation; § 2 speaks directly to these shipments. Indeed all "importation" involves shipments from another state or nation. *Every* use of § 2 could be called "discriminatory" in the sense that plaintiffs use that term, because every statute limiting importation leaves intrastate commerce unaffected. If that were the sort of discrimination that lies outside state power, then § 2 would be a dead letter.
>
> No decision of the Supreme Court holds or implies that laws limited to the importation are problematic under the dormant commerce clause.

Ibid., 227 F.3d at 853.

Subsequent to the Sixth Circuit's decision, a unanimous panel in the Second Circuit, after an extensive discussion of the history of the Twenty-First Amendment and the decisions of this Court, concluded that the statutory scheme in New York, as in Michigan, regulated only the importation into and distribution of alcohol within the state and the statute fell within the ambit of the powers granted to states by the Twenty-First Amendment. The state's regime, said the panel, targets "valid state interests in controlling the importation and transportation of alcohol." *Swedenburg, et al. v. Kelly, et al.*, Nos. 02-9511, 02-7089 Con (Slip Op. 2nd Cir. Feb. 12, 2004), 2004 WL 254401.

If the Sixth Circuit's opinion is allowed to stand, there will be differing rules in differing circuits as to the manner in which states are allowed to regulate or control the importation of alcohol beverages, leading to the same confusion and inconsistency in state laws that this Court and Congress sought to resolve beginning more than a century ago.

III. THIS CASE HAS SIGNIFICANT NATIONAL IMPORTANCE.

As indicated, alcohol beverages constitute one of the most heavily regulated and taxed lawful products traveling in commerce today. Not everyone can sell alcohol beverages. Producers, importers and wholesalers must apply for and be granted a federal Basic Permit by the Alcohol and Tobacco Tax and Trade Bureau, an agency of the Department of the Treasury. They, like brewers and retailers, must also be licensed by the states (one or more) in which they propose to do business; the licensing process often involves an extensive criminal background check.

And not everyone can buy alcohol beverages. Purchasers in every state must be twenty-one years of age or older. In many states, on-premises retailers (e.g., restaurants, taverns, and bars)

are prohibited from selling alcohol beverages to any adult who is or who appears to be intoxicated.

The only way a state can insure compliance with its laws is to have a system of accountability, with penalties associated with violations of state law. Accountability can only occur if the states have the ability to reach the seller, i.e., if the seller has some kind of presence in the state to justify jurisdiction and enforcement. Without accountability, there can be no effective regulation. Upholding the Sixth Circuit's decision would undermine accountability and create what some have called "alcohol anarchy."

Some states have chosen to permit direct shipping of alcohol beverages, but only under carefully controlled circumstances. That is their right under the Twenty-First Amendment. But no state allows unlimited and unregulated direct shipping. For them and for the states like Michigan and more than two dozen others which have opted to secure accountability through other means and which ban the interstate direct shipment of alcohol beverages, this case has enormous importance.

If the Sixth Circuit's decision is upheld, how are states going to effectively keep alcohol beverages out of the hands of minors? A recent federally-funded study suggests that the problem of internet alcohol beverage purchases is so great that "an argument can certainly be made for banning Internet and home delivery sales altogether in light of the likelihood that these methods will be used by underaged purchasers."[5]

If the Sixth Circuit's decision is upheld, how are states going to effectively collect the taxes that are due on alcohol beverage sales? This Court's decision in *Quill v. North Dakota*, 504 U.S. 298 (1992) makes it clear that attempts to require out-of-state

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[5] *Reducing Underage Drinking: A Collective Responsibility*. Richard J. Bonnie and Mary Ellen O'Connell, Editors. National Research Council and Institute of Medicine (2003), at 176.

sellers to remit sales, and possibly other, taxes place impermissible burdens on interstate commerce that only Congress can rectify.

If the Sixth Circuit's decision is upheld, how are states going to insure that alcohol beverages do not reach "dry" areas where residents have determined that they do not wish the sale of alcohol beverages to occur?

As indicated, the issues surrounding this case have been, and are being litigated across the country. Decisions have been rendered in the Fourth Circuit,[6] Fifth Circuit[7] and Eleventh Circuit.[8] Cases are currently pending at the trial level in Arizona,[9] New Jersey,[10] Ohio[11] and Rhode Island.[12] Other states are potential targets of similar litigation. A clear mandate from this Court is needed to avoid further inconsistency and conflict.

The cornerstone of alcohol beverage regulation in this country has always been that it is up to the states—not the federal government or the federal judiciary—to regulate the importation and transportation of alcohol beverages into their jurisdictions. This is not a case about a few oenophiles wanting to buy fine wine that might not otherwise be available in their community, or other purchasers wanting the convenience of sitting at their computers and ordering on-line, the way they order books and apparel. Alcohol beverages and their regulation are *sui generis* and should remain that way.

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[6] *Beskind v. Easley*, 325 F.3d 506 (4th Cir. 2003) and *Bolick v. Danielsen*, 330 F.3d 274 (4th Cir. 2003).

[7] *Dickerson v. Bailey*, 336 F.3d 274 (5th Cir. 2003).

[8] *Bainbridge v. Turner*, 311 F.3d 1104 (11th Cir. 2002).

[9] *Parker v. Morrison*, No. 2:03-cv-01948 (D. Ariz.).

[10] *Freeman v. McGreevey*, No. 2:03-cv-03140 (D. N.J.).

[11] *Stahl v. Taft*, No. 2:03-cv-00597 (S.D. Ohio).

[12] *Wolfson v. Carcieri*, No. 1:03-cv-00463 (D. R.I.).

CONCLUSION

For the reasons stated above, it is urged that this Court reverse the opinion of the United States Court of Appeals for the Sixth Circuit and declare that, pursuant to the Twenty-First Amendment and 27 U.S.C. § 122, states have the right to prohibit the direct shipment of alcohol beverages from out-of-state sources even when they permit in-state suppliers to ship directly.

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BRIEF OF NATIONAL BEER WHOLESALERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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PARTIES TO THE PROCEEDINGS

Petitioners, Defendant-Appellees below, are State of Michigan officials including the Governor, the Michigan Attorney General, and the Chair of the Liquor Control Commission (hereafter collectively referred to as "Michigan" or the "State"). The current holders of those offices have been substituted as parties for the former office holders pursuant to Sup. Ct. R. 35.3.

Petitioner, intervening Defendant-Appellee below, is the Michigan Beer & Wine Wholesalers Association ("MB&WWA"), a trade association of the Michigan beer and wine wholesalers that intervened as a defendant in the district court.

Respondents, Plaintiffs-Appellants below, include Eleanor Heald, Ray Heald, John Arundel, Karen Brown, Richard Brown, Bonnie McMinn, Gregory Stein, Michelle Morlan, William Horwath, Margaret Christina, Robert Christina, Trisha Hopkins, Jim Hopkins and Domaine Alfred, Inc. The thirteen individual parties are Michigan residents who are wine connoisseurs, wine journalists, and wine collectors. Respondent Domaine Alfred, Inc. is a California winery.

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BRIEF OF NATIONAL BEER WHOLESALERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*

Since 1938, the National Beer Wholesalers Association ("NBWA") has served as the national membership organization of the beer wholesaling industry representing over 2,200 licensed beer wholesalers.[1] Its members reside in all fifty states. In 1997, U.S. beer wholesaler direct sales

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[1] This *amicus curiae* brief filed in support of the Petitioners was funded solely by the National Beer Wholesalers Association and authored solely by counsel for the National Beer Wholesalers Association. This brief is filed with the consent of the parties, evidence of which is submitted with this brief.

reached $30.5 Billion Dollars. Beer wholesalers employed 92,860 individuals and paid $3.4 Billion Dollars in wages. The total economic activity directly generated by beer wholesalers was $8.2 Billion Dollars. The total state and local taxes paid directly by beer wholesalers was $2.4 Billion Dollars. *See Beer Wholesalers: Their Role and Economic Performance*, at 46-47 (3d ed. 1999).

The economic activity of distributing beer stimulates other activity in the economy. Economists refer to this as the "multiplier effect". In other words, every dollar spent by wholesalers to buy such things as vehicles, equipment, computers and other goods and services represents income to other industries. Taking into account the "multiplier effect", the total direct and indirect economic contribution of beer wholesalers nationwide in 1997 was as follows: 368,010 jobs created, $10.2 Billion Dollars in wages paid, $28.4 Billion Dollars in total economic activity created, and $4.0 Billion Dollars in state and local taxes paid. *Id.* at 47. Obviously, the economic contribution of beer wholesalers is even greater today.

This case implicates the essential interests of NBWA and its members. The Sixth Circuit decision in *Heald v. Engler*, 342 F.3d 517 (6th Cir. 2003) threatens to dismantle complex state regulatory systems governing alcoholic beverages that have worked remarkably well for over seventy (70) years. Through these delicately balanced and historically tested regulatory schemes, states have addressed several fundamental interests: preventing illegal sales to minors, inhibiting overly aggressive marketing and consumption, collecting taxes, creating orderly distribution and importation systems, and preventing a recurrence of the problems that led to the enactment of National Prohibition.

Specifically, the *Heald* decision puts at risk the requirement that all imported alcoholic beverages be delivered to an in-state licensee, thereby assuring effective regulation. Ordinarily, wholesalers are the in-state licensed entities through which imported alcoholic beverages must pass. Wholesalers pay excise taxes on imported product and retain records of their sales to retailers, thereby creating a transparent and accountable distribution system. They have invested large sums in creating these distribution systems in a highly regulated environment. These investments are jeopardized if the regulatory playing field is tipped against in-state licensees and out-of-state entities are permitted to ship directly to consumers.

SUMMARY OF ARGUMENT

By every test used by this Court, the Petition for Writ of Certiorari should be granted. First, there is substantial conflict among the federal circuits regarding the scope of a state's right to regulate the importation of alcoholic beverages under the Twenty-first Amendment to the United States Constitution. Specifically, the Sixth Circuit decision, as well as a similar decision in the Fifth Circuit, conflicts with decisions in the Second, Fourth, Seventh, and Eleventh Circuits. *See Heald v. Engler*, 342 F.3d 517 (6th Cir. 2003); *Dickerson v. Bailey*, 336 F.3d 388 (5th Cir. 2003); *Swedenburg v. Kelly, et al.*, 2004 WL 254401 (2nd Cir. Feb. 12, 2004); *Beskind v. Easley*, 325 F.3d 506 (4th Cir. 2003); *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000), *cert. denied sub. nom.*, *Bridenbaugh v. Carter*, 532 U.S. 1002 (2001); *Bainbridge v. Turner*, 311 F.3d 1004 (11th Cir. 2002).

Second, the Sixth Circuit decision conflicts with (and essentially ignores) the Twenty-first Amendment, the Webb-Kenyon Act, 27 U.S.C. § 122, and numerous decisions of this Court, including, without limitation, *State Bd. Of Equalization v. Young's Market Co.*, 299 U.S. 59 (1936), *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964) and *North Dakota v. United States*, 495 U.S. 423 (1990).

Finally, the issues involved in the *Heald* case are of nationwide importance, as evidenced by the number of cases devoted to these issues. Fundamentally, the case involves the right of states to control and regulate the importation of alcoholic beverages into and within their borders. In recognition of historical abuses and of the social costs that flow from intemperate consumption, alcohol is one of the most heavily regulated products in the country and is accorded a unique status under our Constitution. As such, states are free to regulate the product in accordance with community norms and standards.

The *Heald* decision erodes, indeed destroys, the primary keystone of state regulatory power, namely the right under the Twenty-first Amendment to control the importation of alcoholic beverages into the State and insist on importation and distribution through licensed entities with a physical presence in the state. Without apparent regard to the consequences of its decision, the *Heald* case makes a Trojan Horse of one minor Michigan statutory provision which permits in-state wineries (which are subject to the licensing authority of the state), but not out-of-state wineries (which are outside the regulatory reach of the state), to ship direct to consumers, and thereby topples a comprehensive three-tier system governing alcoholic beverage distribution. Furthermore, the remedy not only undermines effective regulation, but discriminates against licensed in-state wholesalers and retailers, since they, unlike unlicensed out-of-state suppliers, are subject to enforceable regulations and taxation. In doing so, the Sixth Circuit decision ignored (or at least rendered irrelevant) the Twenty-first Amendment (which represents a national consensus reached by the American people just seventy years ago), a long line of decisions by this Court recognizing a state's fundamental and constitutional right to regulate alcoholic beverages, and an Act of Congress (the Webb-Kenyon Act) which explicitly grants states that right.

ARGUMENT

I. THERE IS A SUBSTANTIAL CONFLICT AMONG THE FEDERAL CIRCUITS REGARDING A STATE'S RIGHT TO REGULATE THE IMPORTATION OF BEVERAGE ALCOHOL UNDER THE TWENTY-FIRST AMENDMENT.

As noted and discussed in the Petitioners' Briefs in Support of Petition for Writ Of Certiorari, the Sixth Circuit's decision conflicts directly with decisions of the Seventh, Eleventh, and Fourth Circuit. *See Heald v. Engler*, 342 F.3d 517 (6th Cir. 2003); *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000), *cert. denied sub. nom.*, *Bridenbaugh v. Carter*, 532 U.S. 1002 (2001); *Bainbridge v. Turner*, 311 F.3d 1104 (11th Cir. 2002); *Beskind v. Easley*, 325 F.3d 506 (4th Cir. 2003). This conflict in and of itself justifies review by the Court.

Since the submittal of Petitioners' Briefs, the Second Circuit Court of Appeals rendered its decision in *Swedenburg v. Kelly, et. al.*, 2004 WL 254401 (2d Cir. Feb. 12, 2004). In a thoughtful and historically grounded analysis, the *Swedenburg* court, like the Seventh Circuit in *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000), *cert. denied sub. nom.*, *Bridenbaugh v. Carter*, 532 U.S. 1002 (2001), upheld state laws regulating the importation of alcoholic beverages by requiring that they pass through an in-state licensee. The *Swedenburg* court noted that "'[b]oth the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution,' and considers each 'in the light of the other, and in the context of the issues and interests at stake in any concrete case.'" *Swedenburg, supra*, at 4 (quoting in part *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332 (1964)). The court focused upon "the scope of the Twenty-first Amendment's grant of authority such that it is exempted from the effect of the dormant Commerce Clause." *Id.* This approach in consistent with the decisions of this

Court, which has never, by decision or language, suggested any contrary mode of analysis when evaluating regulations governing the importation of alcoholic beverages.

Significantly, the Second Circuit upheld New York's regulatory scheme even though it prohibited out-of-state wineries from importing and selling wine directly to consumers, while it permitted local wineries to do so. The Second Circuit expressly rejected the two-step analysis utilized by the Fifth, Sixth, and Eleventh Circuits. In pertinent part, the Sixth Circuit employed traditional dormant Commerce Clause analysis. First, the Sixth Circuit examined whether the regulation in question "affects interstate commerce in a manner either that (i) discriminates against interstate commerce, or (ii) imposes burden on interstate commerce that are in commensurate with putative local gains." *Swedenburg v. Kelly, et al.*, 2004 WL 254401, at 4 (2d Cir. Feb. 12, 2003) (quoting *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200, 208 (2d Cir. 2003)). Second, concluding that the regulation in question failed to pass muster, the Sixth Circuit examined whether the regulation in question implicated one of the Twenty-first Amendments "core concerns". If so, it may be "saved", notwithstanding its discriminatory effect. *Id.* As noted by the *Swedenburg* court, however, this analysis ignored (or at least rendered irrelevant) the express language of the Twenty-first Amendment, the Webb-Kenyon Act, and numerous decisions of this Court. *Swedenburg, supra*, at 4-5.

II. THE *HEALD* DECISION CONFLICTS WITH THE EXPRESS LANGUAGE OF THE TWENTY-FIRST AMENDMENT, THE WEBB-KENYON ACT, AND DECISIONS OF THE UNITED STATES SUPREME COURT.

A. History Of The Twenty-first Amendment And Webb-Kenyon Act

Until the late nineteenth century, alcoholic beverages were normally regulated at the local level. Ultimately, for a variety

of reasons, local regulation failed. Thereafter, states attempted to regulate alcoholic beverage distribution and sales. *See* Raymond B. Fosdick & Albert L. Scott, *Tavard Liquor Control*, 10-11 (1933); Leonard Havion & Elizabeth Laine, *After Repeal*, 6-7 (1936). These efforts were "thwarted by Supreme Court decisions involving the doctrine now known as the Commerce Clause." *Swedenburg, supra*, at 5 (citing *Bowman v. Chicago & NW Ry Co.*, 125 U.S. 465 (1888); *Leisy v. Hardin*, 135 U.S. 100 (1890)). States were freed from this constraint by the Webb-Kenyon Act, which was held constitutional in 1917. *Clark Distilling Co. v. Western Maryland Railway Co.*, 242 U.S. 311 (1917). Until the passage of the Webb-Kenyon Act, states were effectively unable to impose their own systems for the regulation of the distribution and sale of alcoholic beverages. To do so required, and still requires, control of importation. Otherwise, orderly markets are destroyed by competition from unlicensed, unregulated, and untaxed out-of-state competitors. States never had the opportunity to demonstrate that, after the passage of the Webb-Kenyon Act, they could effectively regulate the importation, distribution and sale of alcoholic beverages. This was because of the adoption of National Prohibition in 1919. The ultimate failure of Prohibition showed that federal regulation of the distribution and sale of alcoholic beverages, without regard to local norms and standards, was also ineffective.

By 1933, it was evident to a majority of Americans that National Prohibition was a failed experiment. Subsequently, the nation ratified the Twenty-first Amendment, which represents a constitutional commitment to make permanent the policy behind the Webb-Kenyon Act: that the state be the focus of alcoholic beverage control. Leonard Harrison and Elizabeth Laine, *After Repeal*, 6-8, (1936). As observed by the *Swedenburg* court, Section 2 of the Twenty-first Amendment "effectively constitutionalizes most state prohibitions regulating importation, transportation, and distribution of

alcoholic beverages from the stream of interstate commerce in to the state." *Swedenburg v. Kelly, et al.*, 2004 WL 254401, at 6 (2d Cir. Feb. 12, 2004) (quoting in part *Craig v. Boren*, 429 U.S. 190, 205-206 (1976)). Expressed in another way, Section 2 grants "the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *California Retail Liquor Dealers Ass'n v. Mid Cal Aluminum, Inc.*, 445 U.S. 97, 110 (1980).

The Twenty-first Amendment embeds the Webb-Kenyon Act in the Constitution of the United States. *Craig v. Boren*, 429 U.S. 190, 205-206 (1976). By its decision, the *Heald* court rendered the Amendment essentially meaningless. However, "[t]he Amendment was not a narrow legislative delegation of federal authority; it was the will of a nation speaking through its constitutional process." *Swedenburg, supra*, at 4.

B. The *Heald* Decision Is Inconsistent With Prior Decisions Of This Court Interpreting The Twenty-First Amendment.

Shortly after its enactment, this Court recognized the broad powers conferred upon the states by the Amendment. *See, e.g., State Board of Equalization v. Young's Market Co.*, 299 U.S. 59 (1936) (upholding a statute that imposed a license fee on beer importers); *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401 (1938) (upholding a limitation on the types of blended spirits imported into the state, which was not imposed upon those produced in state); *Ziffrin v. Reeves*, 308 U.S. 132 (1939) (upholding regulation of the exportation of alcoholic beverages out of the state). Specifically, these cases upheld the states' power to regulate alcoholic beverages even when it burdens out-of-state interests vis-à-vis in-state interests. *Id.* The common thread running through these decisions is the recognition that control of importation is the essential component of the states' licensing and regulatory authority

and that the Twenty-first Amendment insulates that power from dormant Commerce Clause challenge and from claims of discriminatory treatment.

The Sixth Circuit, calling citation to earlier Twenty-first Amendment decisions "disingenuous," declared that this Court rejected these earlier decisions in *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964) and *Bacchus Imports, Ltd. v. Dias*, 408 U.S. 263 (1984). Contrary to the Sixth Circuit's understanding, however, *Hostetter* and *Bacchus* do not constitute the rejection of this Court's earlier jurisprudence. In *Hostetter*, New York attempted to close down an airport duty free shop, whose products were delivered to the ultimate consumer just prior to boarding and were used abroad. This Court simply held that such distribution did not fall within the express terms of the Twenty-first Amendment since consumption would not occur within the state.

In *Bacchus*, Hawaii had exempted from taxation two locally produced products, ti root brandy and pineapple wine. The exemptions had explicitly been passed and were explicitly defended by the state as exclusively motivated by a desire to aid local industry. The Twenty-first Amendment was not even cited by Hawaii until it submitted its brief to this Court. Writing the majority opinion, Justice White found this "belated" argument unconvincing.

Hostetter and *Bacchus* each presented an unusual set of facts. These cases simply did not implicate the states' interests under the Twenty-first Amendment. Certainly, no aspect of the ruling in these cases provided a carte blanche for lower federal courts to recast Twenty-first Amendment analysis or discard state regulatory schemes governing the importation, sale and distribution of alcoholic beverages. Furthermore, as noted by the *Bridenbaugh* and *Swedenburg* courts, nothing in these cases mandated dormant Commerce Clause or "core power" analysis when considering challenges to state impor-

tation regulation or to requirements that alcoholic beverages be distributed through in-state licensed entities. *See Swedenburg, supra*, at 17-21; *Bridenbaugh supra*, at 851-854; *but see Heald v. Engler*, 342, F.3d 317, 324 (6th Cir. 2003).

This Court has consistently reaffirmed the right of states under the Twenty-first Amendment to control the importation of alcoholic beverages. In *North Dakota v. United States*, 495 U.S. 423 (1990), the Court upheld labeling and reporting requirements for alcoholic beverages shipped to military bases, under concurrent jurisdiction. Justice Stevens wrote that "within the area of its jurisdiction, the state has 'virtually complete control' over the importation and sale of liquor and the structure of the liquor distribution system. *Id.* at 431; *see California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980); *see also Capital Cities Cable, Inc. v. Crisp*, 476 U.S. 694, 712 (1984); *California Board of Equalization v. Young's Market Co.*, 299 U.S. 59 (1936)." He further noted that "[i]n the interest of promoting temperance, ensuring orderly markets conditions, and raising revenue, the state established a comprehensive system for the distribution of liquor within its borders. That system is unquestionably legitimate." *North Dakota v. United States*, 495 U.S. 423, 432 (1990) (citing *Carter v. Virginia*, 321 U.S. 131 (1944) and *State Board of Equalization v. Young's Market, Co.*, 299 U.S. 59 (1936)).

The *Heald* Court either ignored or misinterpreted this Court's Twenty-first Amendment jurisprudence. This Court has repeatedly reaffirmed the principle that the Twenty-first Amendment authorized each state to regulate alcoholic beverages within its borders and that the Twenty-first Amendment creates "an exception to the normal operation of the Commerce Clause." *Craig v. Boren*, 429 U.S. 190, 206, n. 11 (1976).

III. THE ISSUES INVOLVED IN THE *HEALD* CASE ARE OF NATIONAL IMPORTANCE.

The *Heald* decision cripples the ability of the state to regulate alcoholic beverages by proscribing the power to control importation. In Michigan, state law requires out-of-state wineries (which are not licensed and are not subject to effective control by the state) to sell only to licensed entities. The law permits in-state wineries (which are licensed and are subject to effective control by the state) to sell, under certain circumstances, direct to consumers. Relying upon inapposite dormant Commerce Clause analysis, the Sixth Circuit found this differential treatment fatally defective, struck down the direct shipment prohibition, and essentially ignored both the Twenty-first Amendment and the effect of its decision upon complex, state regulatory systems.

While this case may involve oenophiles, it is constitutionally indistinguishable from one involving spirits or beer. There is no distinction between the importation of a highly allocated cult wine and that of an alcopop or distilled spirits. How are regulators expected to effectively police underage sales when a resourceful teenager can order distilled spirits through the mail? A state cannot effectively hold an out-of-state licensed entity accountable for such a violation of state law. Is state regulation at risk because of the existence of brew-pubs, since in-state suppliers are permitted to sell on-premise? Similarly, the logic of the opinions would further seem to apply to importation controls that result in any difference between an in-state licensee and an unlicensed out-of-state supplier, even where the purpose of that importation control is to ensure compliance with state law by requiring that all importation be to a licensed entity physically present within the state. As noted by the Second Circuit, "[p]resence ensures accountability." *See Swedenburg v. Kelly, et al.*, 2004 WL 25 4401, at 10 (2nd Cir. Feb. 12, 2004) ("all [suppliers] must either utilize the three-tier system or obtain a physical

presence from which the state can monitor and control the flow of alcohol.") Licensed, physical presence of at least one party in the chain of distribution is the cornerstone of an orderly, transparent, and accountable alcoholic beverage distribution system, and its validity has never been questioned by this Court.

The Sixth Circuit also ignores the competitive advantage that its decision confers upon out-of-state suppliers. By effectively exempting out-of-state suppliers from the regulatory reach of the state, these suppliers are free to violate a state's laws without fear of consequences. Accordingly, the inequitable outcome of the decision will be that out-of-state suppliers are accorded a benefit not enjoyed by in-state suppliers, while at the same time, states are hamstrung in the effective enforcement of their laws over out-of-state suppliers.

Finally, the *Heald* decision is of national significance because it apparently eliminates in their entirety the provisions of Michigan law which require imported alcoholic beverages to be delivered to in-state licensed entities. This remedy is ungrounded in law and unnecessarily destructive of an effective, comprehensive, and long-established state regulatory system. In *Beskind*, the Fourth Circuit found unconstitutional North Carolina's "juxtaposition" of a prohibition on direct shipments from out-of-state wineries with an exception for such shipments from in-state wineries. The Court, however, struck down only the in-state exception and left "in place the three-tiered system that North Carolina had employed since 1937 and has given every indication it wants to continue to employ." *See Beskind v. Easley*, 325 F.3d 506 (4th Cir. 2003). The Sixth Circuit ruling runs afoul of the principle that a constitutionally flawed provision must be severed from the remainder of the statute and the statute maintained insofar as it is valid. *See, e.g. Leavitt v. Jane L.*, 518 U.S. 137 (1996); *Denver Area Educational Telecommu-*

nications Consortium, Inc. v. FFC, 518 U.S. 727 (1996); *Buckley v. Valeo*, 424 U.S. 108 (1976). One small exception to the three-tier system of distribution, even if constitutionally invalid, does not call for the dismantling of Michigan's regulatory scheme by eliminating an even-handed and essential requirement that all alcoholic beverages consumed in Michigan pass through or originate from a licensee physically present within the state.

CONCLUSION

For the reasons set forth above, Amicus Curiae NBWA respectfully requests that the Court grant the Petition for a Writ of Certiorari.

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In The Supreme Court Of The United States

JENNIFER M. GRANHOLM, GOVERNOR, et al.,
Petitioners,

v.

ELEANOR HEALD, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF OHIO AND 35 OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Under state law, the Michigan Liquor Control Commission generally bans out-of-state direct shipment of alcoholic liquor to consumers' doorsteps, but permits in-state licensed wineries to direct ship to consumers, and out-of-state wineries to import through in-state licensed wholesalers. Out-of-state wineries may also petition the State Liquor Control Commission for an order permitting them to ship wine directly to consumers in the State. Any denial of such a request may be appealed through the State court system. Section 2 of the Twenty-First Amendment to the United States Constitution expressly prohibits importation of alcoholic beverages into any state for delivery or use, in violation of the laws of the State. The Court of Appeals declared Michigan's alcoholic liquor importation law facially unconstitutional in violation of the Commerce Clause. The question presented is:

Does Michigan's regulation of the importation of beverage alcohol under the Twenty-First Amendment facially violate the Commerce Clause when it permits in-state licensed wineries to directly ship alcohol to consumers, but requires out-of-state wineries to import its products through licensed in-state wholesalers and to sell its products through licensed retailers or request permission of the Liquor Control Commission to bypass this distribution system and ship directly to consumers?

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STATEMENT OF *AMICI* INTEREST

Amici State of Ohio and 35 other States have a vital interest in this case, which implicates one of the core police powers reserved to the States—the power to regulate the transportation or importation of intoxicating liquors into the State. This case asks the Court to define the scope of the States' regulatory power under the Twenty-First Amendment, and also to resolve the interplay between that express constitutional grant of authority and this Court's Dormant Commerce Clause jurisprudence. Does section two of the Twenty-First Amendment empower States to prohibit shipment of alcohol directly to their residents by out-of-state producers, or does this State regulation violate the Dormant Commerce Clause? Similarly, may a State allow wineries located within its borders to ship their products directly to a resident in the State, while prohibiting wineries without a presence in the State from directly shipping their product to residents of the State? This case directly presents this conflict between the States' ability to regulate alcohol in order to protect the health, safety, and well-being of its citizens—a power explicitly recognized in the United States Constitution—and the opposing interest in allowing interstate commerce to flow unfettered.

The possibility that federal courts may eviscerate the States' ability to maintain their liquor control systems, as some Circuit Courts have already done, is of paramount concern to all States. The *amici* States all have a strong interest in the resolution of this issue, as every State regulates in some manner the direct shipment of alcohol to its residents.[1] The intensity of State interest in alcohol

[1] State regulation is generally separated into three types. First, "reciprocity states" are those States that allow direct shipments only from States that afford the reciprocal privilege. The 13 states are California, Colorado, Hawaii, Idaho, Illinois, Iowa, Minnesota, Missouri, New Mexico, Oregon, Washington, West Virginia, and Wisconsin. Second,

regulation, as well as the difficulty presented by conflicting Circuit decisions on the interplay between the Twenty-First Amendment and the Dormant Commerce Clause, is perhaps best reflected by the fact that in the year 2003 alone, 26 state legislatures entertained bills to amend or create direct shipping legislation. *See Website of National Conference of State Legislatures.*[2] States that have had their alcohol shipment regulations struck down by courts as violating the Dormant Commerce Clause have enacted new laws on the issue. The Fourth Circuit struck down North Carolina's statute in April 2003. *Beskind v. Easley*, 325 F.3d 506 (4th Cir. 2003). By August 2003, North Carolina had enacted new liquor shipment regulation. *See* N.C. Gen. Stat. 18B-109 (2003) (enacted Aug. 7, 2003).

Another State revised its statute while a legal challenge to the regulatory scheme was pending in the courts. The Virginia legislature enacted legislation that ended Virginia's express prohibition on alcohol shipments direct to

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"limited personal importation states" are those States that allow direct shipment of alcohol in limited amounts if certain State requirements are met. An example of such special requirements is Vermont's system, which requires the consumer to receive a shipping permit from the State. The 23 limited personal importation States are Alabama, Alaska, Arizona, Connecticut, Florida, Georgia, Louisiana, Michigan, Nebraska, Nevada, New Hampshire, New Jersey, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Texas, Vermont, Virginia, and Wyoming. Third, "express prohibition States" are those States that simply ban all direct shipments of alcohol. The 15 express prohibition States are Arkansas, Delaware, Indiana, Kansas, Kentucky, Maine, Massachusetts, Maryland, Mississippi, Montana, New York, North Dakota, South Dakota, Tennessee, and Utah. *See* Vijay Shankar, Note, *Alcohol Direct Shipment Laws, the Commerce Clause, and the Twenty-First Amendment*, 85 Va.L.Rev. 353, 356-57, n.20, 22, 24 (1999) (States have been re-classified from what appears in the article due to statutory changes since 1999).

[2] www.ncsl.org/programs/lis/CIP/CIPCOMM/shiplegis03.htm (visited February 24, 2004).

residents—a prohibition that had been in place for 69 years, since the repeal of Prohibition. Virginia now allows limited personal importation of wine by allowing out-of-state wineries to ship limited quantities of wine direct to Virginia residents. Va. Code Ann. 4.1-112.1 (Michie 2003) (enacted July 1, 2003). Such quick responses by the States' legislatures highlights the importance the issue of regulating alcohol shipping presents to the States.

This Court has heard cases interpreting the power of the States to regulate alcohol under the Twenty-First Amendment many times in various contexts. This Court has never articulated, however, a test for analyzing the interplay between the Dormant Commerce Clause and the States' power under the Twenty-First Amendment. Further, this Court has not addressed the States' authority to regulate interstate shipment of alcohol since the advent and growth of the Internet and electronic commerce, tools that have dramatically increased such shipments. Only this Court can clarify the boundaries between the Twenty-First Amendment and the Dormant Commerce Clause, thereby clearly delineating the scope of State authority.

The current Circuit split on this issue means that States are receiving no clear guidance as to the extent of permissible regulation of alcohol shipments. Moreover, the split exposes the States to varying treatment depending on the Circuit in which the issue arises. In short, this case has a significant impact on all the States, not just those in the Sixth Circuit. Because of the disparity in the tests that are applied to the States' regulatory schemes depending on the Circuit, schemes may be declared unconstitutional because of the test the court elects to apply rather than the because of the substance of the law. The *amici* States therefore urge this Court to grant certiorari and reverse.

REASONS FOR GRANTING THE WRIT

The petition should be granted for at least three reasons. First, the split among the Circuit Courts on the issue of whether States may prohibit direct shipment of alcohol by out-of-state wineries is both clearly developed and deep. Further percolation in the Circuits offers no benefits. The Seventh Circuit and the Second Circuit have given a straightforward reading to the Twenty-First Amendment and the powers granted therein to the States to regulate shipments of alcohol into the States. Under this analysis, these two Circuits have upheld State regulation of alcohol shipments within their borders. The Fourth, Fifth, Sixth, and Eleventh Circuits, by contrast, have chosen to apply traditional Commerce Clause analysis to alcohol shipment laws. Under this approach, however, no Circuit Court has ever found a State regulation on alcohol shipping to be valid.

These competing cases, which involve vastly different treatment of virtually identical regulatory schemes, have created an irreconcilable conflict, both as to mode of analysis and as to result. Michigan's certiorari petition clearly presents this irreconcilable split among the Circuits. Michigan's regulatory scheme, similar to schemes of the other 20 "limited personal import" States, regulates shipments of alcohol into the State by out-of-state entities differently from how it regulates in-state shipments. As Michigan's regulation is plainly authorized by the Twenty-First Amendment, this regulatory scheme would be found a valid exercise of State power if reviewed by the Seventh or Second Circuit, but was struck below here.

Second, it is important for the Court to consider this issue now. Six Circuits have already weighed in, and the competing arguments are well-developed. Thus, further percolation would offer little, if any, benefit. Moreover, the

recent proliferation of small-production wineries, whose sole marketing and sales agenda is direct shipment with sales made over the internet, means that this area of regulation is increasingly important—both to the States from a police power perspective, and to wineries and consumers from an interstate commerce perspective. *See* www.freethegrapes.com (visited February 25, 2004).

Third, the Sixth Circuit's decision, by applying an erroneous analysis of the States' Twenty-First Amendment authority, results in a constitutional amendment by judicial fiat. The Sixth Circuit, along with the Fourth, Fifth, and Eleventh Circuits, edits section two of the Twenty-First Amendment from the Constitution. Review is particularly important because the Sixth Circuit's decision and analysis strikes directly at the heart of federalism. The decision by the Sixth Circuit fails to respect the power granted to the States by the Twenty-First Amendment to regulate delivery or use of alcohol within the State. The States have a significant interest in exercising their police powers to protect the health safety and welfare of their citizens in the area of alcohol shipping. The States need to know how alcohol regulations are going to be analyzed by the courts so that they are able to properly craft state legislation that reflects the public policy in the separate States concerning alcohol shipping. As proven by the failure of national alcohol regulation, Prohibition, the most effective regulation of alcohol is performed at the State level.

I. The Circuits Are Irreconcilably Split As To Reasoning, Results, And Analysis Of Direct Shipment Regulation

As the Second Circuit explained just weeks ago, the split on the question presented here reflects "the competing demands of the Twenty-First Amendment's grant of authority

to the states to regulate the intrastate traffic of alcohol, with the power reserved to Congress under the Commerce Clause '[t]o regulate Commerce . . . among the several States'" (internal citations omitted). *Swedenburg v. Kelly*, 2004 U.S. App. Lexis 2337 (2nd Cir. Feb. 12, 2004), *5. An irreconcilable conflict has arisen among the six Circuits that have considered the issue as to how to analyze this interplay.

"Four circuits have struck down the regulatory schemes in question, utilizing a two-step analytical framework, . . . in which the statute is first examined in the context of the dormant Commerce Clause." *Id.* at *14-15. These four Circuits, the Fourth, Fifth, Sixth, and Eleventh Circuits, require a federal court to first examine the State statute under Dormant Commerce Clause case law. Then, if the challenged law is of questionable validity under that analysis, the court must determine whether the statute is "saved" by the Twenty-First Amendment.

Two other Circuits, however, the Second and the Seventh, have not only reached different results, but have applied a different legal test. "A second mode of analysis recognizes that '[b]oth the Twenty-First Amendment and the Commerce Clause are parts of the same Constitution,' and considers each 'in the light of the other, and in the context of the issues and interests at stake in any concrete case.'" *Id.* at 11. Thus, under this approach, the court first considers the scope of the Twenty-First Amendment's grant of authority to the States to determine whether the challenged statute is within the ambit of that authority, such that it is exempted from the effect of the Dormant Commerce Clause. *See id.*

The split first arose in 2002 when the Eleventh Circuit found Florida's laws on direct shipping violated the Dormant Commerce Clause and adopted the traditional Dormant Commerce Clause analysis as the test for balancing the

Twenty-First Amendment power with Dormant Commerce Clause concerns. *Bainbridge v. Turner*, 311 F.3d 1104 (11th Cir. 2002). In doing so, the Eleventh Circuit directly rejected the approach used in an earlier Seventh Circuit decision that denied a Dormant Commerce Clause challenge to Indiana's direct shipping laws. *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000). In rejecting *Bridenbaugh*, the Eleventh Circuit stated, "We disagree with the analytical framework used in that case and are skeptical of its assessment of the facts." *Bainbridge*, 311 F.3d at 1114 n.15. Unlike the Eleventh Circuit's "Dormant Commerce Clause first" approach, the Seventh Circuit had first analyzed whether Indiana's statute was within the ambit of the Twenty-First Amendment's grant of authority to the States to regulate importation of alcohol into the State, and thus, entirely exempted from the effect of the Dormant Commerce Clause. *Id.* at 854. Under this method of analysis, perhaps not surprisingly, the Seventh Circuit held that Indiana's statutes were insulated from Dormant Commerce Clause analysis because the laws were directly authorized by section two of the Twenty-First Amendment. *Id.*

Since that time, the split has continued to grow. The Fourth, Fifth, and Sixth Circuits have all weighed in. Each, like the Eleventh Circuit, rejected the Seventh Circuit's approach. *Beskind v. Easley*, 325 F.3d 506 (4th Cir. 2003) ("We determine first whether the purported State regulation violates the Commerce Clause without consideration of the Twenty-First Amendment."); *Dickerson v. Bailey*, 336 F.3d 388 (5th Cir. 2003) ("Under controlling precedent in this Circuit and in the Supreme Court, we are required to assess first whether these statutes violate the Commerce Clause, and, if we so determine, we must then ask whether they are saved by section 2 of the Twenty-First Amendment."); *Heald v. Engler*, 342 F.3d 517 (6th Cir. 2003), rehearing *en banc* denied, *Heald v. Engler*, 2003 U.S. App. Lexis 23001

(Nov. 4, 2003) ("The proper approach in this case, then, is to apply the traditional Dormant Commerce Clause analysis."). The Sixth Circuit decision here followed the traditional Commerce Clause test (*i.e.*, the Eleventh Circuit approach) and made an initial determination that Michigan's statute facially discriminated against out-of-state wineries, thus applying a strict-scrutiny analysis. The court then required the State to establish that it had no reasonable nondiscriminatory means to advance the "core concerns" of the Twenty-First Amendment. Under this analysis, not surprisingly, all of the Circuit Courts, including the Sixth Circuit, held that the State regulations violated the Dormant Commerce Clause. And there can be little doubt that the Sixth Circuit understood itself to be using a different approach than the Seventh Circuit. Indeed, the court was openly critical of the Seventh Circuit's analysis: "*Bridenbaugh* . . . has been criticized by several federal courts for its failure to engage in the requisite dormant Commerce Clause analysis." *Heald*, 342 F.3d 526-27.

While the majority of Circuits to consider the issue have sided with the Eleventh, the split is still very much alive. Indeed, in the weeks since Michigan filed its certiorari petition in this case, the Second Circuit expressly adopted the Seventh Circuit rationale in upholding a New York direct shipment of alcohol law. On February 12, 2004, the Second Circuit adopted the method of analysis used by the Seventh Circuit and denied a Dormant Commerce Clause challenge to New York's direct shipment laws. *See Swedenburg*, 2004 U.S. App. Lexis 2337 at *33-40. In short, the split among the Circuits is pronounced and growing.

Moreover, the split is more than a mere difference in language; the tests are different in important ways. As noted so simply by the Second Circuit, "The inquiry, in our view, should not allow the protective doctrine of the dormant

Commerce Clause to subordinate the plain language of the Twenty-First Amendment. Instead, the inquiry should be sensitive to the manner in which these two constitutional forces interact in light of the impact the Twenty-First Amendment has on dormant Commerce Clause concerns." *Id.* at *18. The Fourth, Fifth, Sixth, and Eleventh Circuits' "Dormant Commerce Clause first approach" effectively edits section two of the Twenty-First Amendment from the Constitution by judicial fiat. The Seventh and Second Circuits have recognized that the Twenty-First Amendment has meaning and that the most logical way to give purpose to that meaning is to apply a straightforward reading: States have the power to prohibit alcohol shipments that are inconsistent with their laws. State laws regulating the shipment of alcohol are more likely to survive in a paradigm that recognizes the full scope of the Twenty-First Amendment than one that does not, and the results to date clearly bear this out.

Nor will this Circuit split simply disappear left to its own devices. Interested parties have already filed lawsuits challenging alcohol shipping laws in the Ninth Circuit (Arizona), Third Circuit (New Jersey), Sixth Circuit (Ohio), and First Circuit (Rhode Island).[3] With the widening Circuit split and the numerous pending challenges to States' direct shipping laws, the need for this Court to provide the necessary guidance is paramount.

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[3] *See* www.wswa.org/public/legal/direct.html (visited on February 24, 2004).

II. Michigan's Petition For Certiorari Presents The Proper Vehicle For This Court To Resolve The Irreconcilable Split In The Circuits.

The Sixth Circuit's decision squarely presents the question of the extent of the States' authority to regulate alcohol shipments for this Court's review. Michigan's law provides a perfect example of typical State efforts to regulate alcohol shipments. Michigan operates a three-tier distribution system, similar to many States. Michigan Pet. at 2. It requires that consumers purchase and receive alcoholic beverages from licensed in-state retailers; that retailers purchase them from licensed wholesalers; and that wholesalers purchase them from licensed manufacturers. *Id.* Michigan has a limited exception to the three-tier system for licensed in-state wineries. These wineries may directly ship only *their* wine products to consumers in Michigan. *Id.* Michigan has no system for licensing direct shipment of alcohol from out-of-state wineries; they must ship through the three-tier system. Michigan's system is very similar in these respects to the Texas law analyzed in *Dickerson*, the Indiana law analyzed in *Bridenbaugh*, the Florida law analyzed in *Bainbridge*, and the North Carolina law analyzed in *Beskind*. All these laws prohibited direct shipment to residents by out-of-state entities, and allowed in-state wineries to ship directly to residents to some degree. Thus, Michigan's law squarely presents the conflict between the Twenty-First Amendment power of States to regulate alcohol shipments and the Commerce Clause interest in unfettered flow of commerce.

A. It is Vital That The Court Resolve This Issue Now. Further Percolation Will Not Clarify The Issues.

While the split among the Circuits widened with the recent decision of the Second Circuit in *Swedenburg*, Michigan's petition for certiorari presents the best vehicle for this Court to address the constitutional questions presented. Every State regulates alcohol in some way. Every State also regulates how alcohol is delivered into the State—specifically, some States allow direct shipment to consumers, and some do not. The issue that Michigan's petition presents, and that the *amici* States urge this Court to review, is what standard of legal analysis shall be applied to properly delineate the boundaries of the Twenty-First Amendment and the Commerce Clause. The exact regulation or scheme of a particular State, *Amici* believe, should not impact this Court's ultimate conclusion as to what is the proper legal analysis the Circuits must apply when reviewing these alcohol shipping regulations. For that reason, *amici* States urge this Court to grant Michigan's petition. There is no need to await a different case—the legal issue is framed and ready for decision.

The factual details of the different regulatory schemes enacted by the States to regulate shipment of alcohol into their borders are not an impediment to this Court's decision to grant certiorari in this case. Michigan and the *amici* States urge this Court to accept jurisdiction in Michigan's case to give broad guidance to all 50 States in enacting legislation pursuant to the Twenty-First Amendment, as well as to the courts that determine the constitutionality of those laws. Specifically, *amici* urge this Court to take this case to announce to the States and the Circuits the proper interplay of the Twenty-First Amendment and the Commerce Clause, regardless of any specific liquor law or regulation.

Independent of a particular fact pattern, the conflict would not disappear even if all States re-wrote their direct shipping laws tomorrow to allow unregulated direct shipping into the States by out-of-state wineries. Challenges to State liquor regulations using the Dormant Commerce Clause as a sword will continue. On February 20, 2004, Costco filed a lawsuit in Washington State challenging the State's prohibition against quantity discounts to liquor retailers, alleging that the prohibition violates the Commerce Clause. *See Costco Challenges Three Tier System in Washington State*, www.winebusiness.com/SalesMarketing/ (visited February 25, 2004). This recent lawsuit illustrates that Commerce Clause challenges to the States' Twenty-First Amendment power to control their liquor system will not simply disappear. The interplay between the Twenty-First Amendment and the Dormant Commerce Clause needs to be clearly defined by this Court. The *amici* States ask this Court to grant Michigan's petition, examine the interplay of the Twenty-First Amendment and the Commerce Clause and provide guidance and clarity.

III. The Sixth Circuit's Erroneous Decision Presents An Immediate Threat To The Core Concerns Protected By The Twenty-First Amendment—Consumption By Minors, Maintaining An Orderly Market, And Collection Of Taxes.

The Sixth Circuit's decision, as well as those by other Circuits on that side of the split, dramatically undermines the States' "virtually complete control" over whether to permit the importation or sale of liquor and eviscerates the States' ability to control and structure their liquor distribution systems. Michigan's petition for certiorari presents this Court with the opportunity to restore the balance of Federalism and re-affirm that it is a matter of States' rights to determine how to structure their liquor control systems.

As this Court has noted, the States' Twenty-First Amendment power is such that "the States have virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980). "By reason of the Twenty-First Amendment the States possess greater authority to regulate commerce in beer than they do commerce in milk." *Healy v. The Beer Institute*, 491 U.S. 324, 346 (1989) (Rehnquist, C.J., dissenting). Instead of recognizing that regulating the shipment of alcohol is the "exercise of a power expressly conferred upon the States" by the Twenty-First Amendment, the Sixth Circuit erroneously determined that under a Commerce Clause analysis the States' "virtually complete control" over liquor regulation, noted by this Court in *North Dakota v. United States*, 495 U.S. 423 (1990) and *Midcal, supra*, "has little value." *Heald*, 342 F.3d at 524. This approach to interpreting the interplay of the Twenty-First Amendment and the Dormant Commerce Clause ignores decisions by this Court dating back to 1936 regarding the proper interpretation of the Twenty-First Amendment—decisions that have never been overruled by this Court. *See State Bd. of Equalization v. Young's Market Co.*, 299 U.S. 59 (1936) (the Twenty-First Amendment confers upon the State the power to forbid all importations that do not comply with the conditions that it prescribes); *Indianapolis Brewing Co. v. Liquor Control Comm'n*, 305 U.S. 391, 394 (1939) (the right of a State to prohibit or regulate the importation of intoxicating liquor is not limited by the Commerce Clause); and *Ziffrin, Inc. v. Reeves*, 308 U.S. 132 (1939) (the Twenty-First Amendment confers upon the State the power to forbid all importations which do not comply with the conditions which it prescribes). The Sixth Circuit went so far as to state that Michigan's reliance on these decisions was "disingenuous at best . . . ." 343 F.3d at 522. It did so

despite this Court's ruling, a mere eight years ago, that "the Twenty-First Amendment limits the effect of the Dormant Commerce Clause on a State's regulatory power over the delivery or use of intoxicating beverages within its borders, ..." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516 (1996).

Instead of applying a straightforward reading of the Twenty-First Amendment, the Sixth Circuit relied upon a number of this Court's decisions from 1960 onward that it described as developing away from a straightforward reading of the Twenty-First Amendment and into a "balancing test" analysis. *Heald*, 343 F.3d at 523. In commenting on the Court's evolving analysis of the Twenty-First Amendment, Chief Justice Rehnquist has stated strongly, "The result reached by the Court in these cases can only be described as perverse. A proper view of the Twenty-First Amendment would require that States have greater latitude under the Commerce Clause to regulate producers of alcoholic beverages than they do producers of milk. But the Court extends to beer producers a degree of Commerce Clause protection that our cases have never extended to milk producers." *Healy v. The Beer Institute*, 491 U.S. 324, 348 (1989) (Rehnquist, C.J., dissenting). The Sixth Circuit erred in analyzing alcohol as it would cheese or any other item of commerce. Alcohol is necessarily a different commodity with regard to the Commerce Clause because of the Twenty-First Amendment. A plain reading of the Twenty-First Amendment shows a grant of authority to the States to regulate the transportation and importation of alcohol into their borders.

The *amici* States all regulate alcohol sales, transportation and importation to some degree. Most States, after Prohibition was repealed, adopted the "three-tier" system of alcohol regulation. *See* Vijay Shankar, Note,

Alcohol Direct Shipment Laws, the Commerce Clause, and the Twenty-First Amendment, 85 Va.L.Rev. 353, 355 (1999). In the three-tier system, a manufacturer may sell only to a wholesale permit holder; a wholesaler may sell only to a retail permit holder; and a retailer may then sell to consumers. The application process for each of these permits is rigorous to ensure that only reputable individuals and companies enter the alcohol business. The need for States to exercise heightened police powers to regulate alcohol sales and use has been noted by this Court: "It is a question of public expediency and public morality, and not of federal law. The police power of the State is fully competent to regulate the business—to mitigate its evils or to suppress it entirely." *Crowley v. Christensen*, 137 U.S. 86, 91 (1890).

While specific requirements for obtaining and keeping a permit to transact business in alcohol vary from State to State, "the requirements facilitate the [States'] role in generating and collecting tax revenue, and in ensuring that licensees comply with the provisions of [the States'] regulatory scheme." *Swedenburg*, 2004 U.S. App. Lexis 2337 at *8. This Court has acknowledged, "In the interest of promoting temperance, ensuring orderly market conditions, and raising revenue, the State has established a comprehensive system for the distribution of liquor within its borders. That system is unquestionably legitimate." *North Dakota v. United States*, 495 U.S. 423, 432 (1990).

The ability of the States to adequately enforce their permit systems has significant revenue implications for the State Treasuries. "[S]tates have insuperable problems collecting their use taxes when people buy from out-of-state vendors that do not collect sales taxes. Noncompliance is almost impossible to detect, and rampant civil disobedience ensures that a handful of prosecutions would not be effective. Private gains from violating the laws vastly exceed the

anticipated legal penalties." *Bridenbaugh*, 227 F.3d at 850. The Sixth Circuit decision striking down Michigan's direct shipment laws will undermine the State's ability to regulate alcohol shipped into the State, as producers are now able to bypass the State system and deliver alcohol direct to consumers. This will inevitably lead to a decrease in revenue generated by Michigan's permit system due to underreporting of use and sales tax by purchasers.[4] Striking down direct shipment laws will significantly impact this important revenue stream during a time when State budgets are constricting. Collection of taxes from out of state entities present difficulties of its own.

The ability of a regulating State to act against an alcohol seller, be it by way of fine, license suspension, or license revocation, will only compel a permit holder to comply with State laws if the disciplinary action can be adequately imposed on the permit holder. The Circuit Courts in their decisions on direct shipment laws have not adequately addressed this legitimate concern.

In *Beskind*, North Carolina specifically argued to the court the difficulty of physical inspections, tax collection, and the deterrent effect of revoking a license, as reasons to limit direct shipment by out of state wineries. 325 F.3d at 515-16. An in-state winery that violates the law and has its

[4] As an example of the types of revenue generated by liquor regulation, in 2003, the State of Ohio, Division of Liquor Control, from permit fees alone, distributed revenues of $27,600,000. Superintendent's Message, Division of Liquor Control. www.liquorcontrol.ohio.gov/liquor1.htm (visited February 25, 2004). The total liquor sales tax and revenue generated by the Ohio Division of Liquor Control in fiscal year 2002 was $194,200,000. *Id.* Other States generate revenues similar to Ohio's revenues via the liquor permit and tax collection system. Kansas reports for fiscal year 2002 Liquor Excise Tax receipts of $26,459,514; Alabama reported total revenue in fiscal year 2002 from sales, taxes, and permits in alcohol of $157,508,329.

license revoked would no longer be able to produce wine, while an out-of-state winery would only be forbidden to ship into North Carolina. *Id.* The Fourth Circuit essentially dismissed these issues by stating, "North Carolina could satisfy its concerns by requiring out-of-state wineries to import their wine into North Carolina to an in-state location and by treating that location in the same manner as it treats in-state winery locations." *Id.* While maintaining an in-state location may help to resolve some of these concerns, it does nothing to address the license revocation issue. Given that there are over 3000 wineries in this country alone,[5] allowing direct shipment with no State oversight can quickly balloon into a huge loss of control of alcohol sales and revenue from the permit sales systems in place in the several States.

Similarly, the Eleventh Circuit dismissed with little discussion legitimate State concerns about the ability to enforce laws against out-of-state entities. Florida argued that "[t]he threat of loss of a beverage license because of sale to underage consumers will better ensure that sale and delivery will only be to qualified consumers." *Bainbridge v. Turner*, 311 F.3d 1104, 1115 (11th Cir. 2002). The Eleventh Circuit concluded, however, that "[t]his means that the out-of-state-firm can equally be threatened with the loss of a beverage license if it illegally delivers alcohol to minors." *Id.* The dissent in *Bainbridge* countered: "This court improperly treats as equal the prospective loss of a beverage license to an in-state firm and the loss of a Florida beverage license of an out-of-state firm, if one is required at all. One would put the firm out of business, the other would simply restrict the market by a state." *Id.* at 1116. Florida also noted the difficulty of collection from out-of-state entities as supporting the need to have those entities participate in the three-tier system. The court brushed this legitimate concern

[5] *See* www.wineweb.com (visited February 25, 2004).

aside, noting "[I]n-state wineries are taxed directly . . . . So why can't out-of-state firms be taxed directly, just like in-state wineries?" *Id.* at 1115. The court missed the point—it is precisely because the firms are located outside the state that tax collection is difficult. The dissent succinctly stated: "The jurisdictional barriers to enforcement of Florida's beverage laws against out-of-state firms selling and delivering directly to consumers justifies the constitutionality of the statutes claimants seek to hold unconstitutional." *Id.* at 1116. As a result of improper use of traditional Commerce Clause analysis, the courts disregard States' concerns that are properly addressed by their police powers and the grant of authority by the Twenty-First Amendment.

Moreover, those Circuits that have elevated the Dormant Commerce Clause to the point of eliminating section two of the Twenty-First Amendment have failed to recognize that by enacting the Webb-Kenyon Act, Congress exercised its Commerce Clause authority and empowered the States to regulate shipment of alcohol into their borders. The Webb-Kenyon Act, 27 U.S.C. 122, enacted in 1917 and re-enacted in 1933, states: "The shipment or transportation . . . of any . . . vinous . . . intoxicating liquor . . . into any state . . . to be . . . sold . . . in violation of any law of such state . . . is prohibited." The Commerce Clause is not dormant in the area of alcohol shipping among the States; rather, Congress has expressly authorized the States to regulate alcohol shipping by enacting the Webb-Kenyon Act.

In *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 88-89 (1984), this Court stated, "It is equally clear that Congress may 'redefine the distribution of power over interstate commerce' by '[permitting] the states to regulate the commerce in a manner which would otherwise not be permissible.'" In the area of insurance, Congress has authorized the States to regulate an item of interstate

commerce to the exclusion of the federal government. *See Western & Southern Life Insurance Co. v. State Board of Equalization*, 451 U.S. 648, 652-55 (1981) (Discussing McCarron-Ferguson Act.). Similarly, Congress, by enacting Webb-Kenyon, expressly empowered States to determine how intoxicating liquor would be permissibly shipped into the States. The Webb-Kenyon Act does not pre-empt State regulation of alcohol shipments. Nor does it so completely "occupy the field" of liquor regulation so as to leave no room for State regulation. Instead, by prohibiting alcohol shipments into a State that are contrary to State law, Congress exercised its Commerce Clause power to expressly empower the States to regulate. The Commerce Clause is not dormant here.

By forgoing any analysis of the Twenty-First Amendment and instead rushing to apply traditional Dormant Commerce Clause analysis to a product that has been carved out of traditional Commerce Clause analysis by constitutional amendment, the Sixth Circuit invaded Michigan's police power to regulate transportation and importation of alcohol within its borders. Such violation of States' police powers is likewise the rule of law in the Fourth, Fifth, and Eleventh Circuits. The time has come for this Court to directly address this question.

The Circuit Court decisions concerning direct shipment of alcohol into a State lead to specific conclusions. First, the "Dormant Commerce Clause first" approach to a State's alcohol shipping regulation will result in a holding that the regulation violates the Commerce Clause. This mode of analysis ignores this Court's decisions that alcohol can be regulated in ways that other items of commerce cannot. Determining whether a State statute is an exercise of power expressly conferred by the Twenty-First Amendment properly balances States' authority and Commerce Clause

interests. Second, the decisions striking down State alcohol shipment laws have not adequately addressed the very real issues that will impact the health, safety, and welfare of the States' residents in the absence of a strong alcohol regulatory scheme. Finally, the specific details of any one state legislative scheme do not present either a better or worse case for this Court to review. All the Circuit Court decisions have reviewed factually different schemes. The common legal question presented is the interplay of power granted to the States by the Twenty-First Amendment and the Commerce Clause. Michigan's petition squarely presents this legal issue for determination. Michigan's petition presents a regulatory scheme that has been well-analyzed by a number of Circuit Courts.

The Court should grant certiorari on Michigan's petition, or, in the alternative, accept both Michigan's petition and any possible petition from *Swedenburg*. At a minimum, *amici* States ask this Court to hold the petition for review pending a potential filing in *Swedenburg*.

CONCLUSION

For the foregoing reasons, *amici* State of Ohio and 35 other States respectfully request that the Court grant the writ of certiorari.

Respectfully submitted,

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Nos. 03-1116, 03-1120 & 03-1274

MOTION FILED
JUN 10 2004

IN THE SUPREME COURT OF THE UNITED STATES

JENNIFER M. GRANHOLM, et al.,
Petitioners,

v.

ELEANOR HEALD, et al.,
Respondents.

CRIMINAL
1745

CHIGAN BEER & WINE WHOLESALERS ASSOCIATION,
Petitioner,

v.

ELEANOR HEALD, et al.,
Respondents.

JUANITA SWEDENBURG, et al.,
Petitioners,

v.

EDWARD D. KELLY, et al.,
Respondents.

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n Writs of Certiorari to the United States
Courts of Appeals for the Second and Sixth Circuits

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SUPREME COURT U.S.

MOTION TO REALIGN PARTIES FOR PURPOSES OF BRIEFING, TO SET BRIEFING SCHEDULE FOR PARTIES AND AMICI, AND FOR EXTENSION OF TIME TO FILE BRIEFS

The States of Michigan and New York (petitioner in No. 03-1116 and respondent in No. 03-1274, respectively), together with petitioner in No. 03-1120 and all private respondents in No. 03-

1274, respectfully move this Court for an order realigning the parties in these consolidated cases (for purposes of briefing), setting a briefing schedule for parties and amici, and extending the time within which to file the parties' and amici's merits briefs.

1. On May 24, 2004, this Court granted three certiorari petitions arising from two different decisions from two courts of appeals: Granholm v. Heald (No. 03-1116; arising from the Sixth Circuit), MI Beer & Wine Wholesalers v. Heald (No. 03-1120; arising from the Sixth Circuit), and Swedenburg v. Kelly (No. 03-1274; arising from the Second Circuit). This Court consolidated the cases and limited review to the following question: "Does a State's regulatory scheme that permits in-state wineries directly to ship alcohol to consumers but restricts the ability of out-of-state wineries to do so violate the dormant Commerce Clause in light of Sec. 2 of the 21st Amendment?"

2. Because the Second and Sixth Circuits respectively upheld and struck down New York's and Michigan's regulatory schemes, the public and private parties who seek to answer the question framed by this Court's order granting certiorari in the affirmative (hereinafter the statutes' "Challengers"), and their respective amici, will, under the ordinary operation of the Court's rules, be required to file as petitioners if they are in

the Second Circuit case and as respondents if they are in the Sixth Circuit case. Conversely, the public and private parties who would answer this Court's question in the negative (hereinafter the statutes' "Supporters") and their respective amici, will, under the ordinary operation of the Court's rules, be required to file as petitioners in the Sixth Circuit case and as respondents in the Second Circuit case.

3. Although the Michigan and New York statutes are different in respects that would make consolidated briefing infeasible, Movants believe that the Court will nonetheless benefit from coordination of arguments between parties and amici on each side of the question the Court has framed. Such coordination would be quite difficult if the Court were not to adopt a consolidated briefing schedule that realigns the parties to create conformity of posture and interests. Without such relief, parties who would be making substantively similar arguments would file their merits briefs at markedly different times, some as petitioners and some as respondents. In addition, amici on both sides of the question the Court has framed may choose to file with the respondents (in whichever case they agree with the respondents), which would disserve the Court by making it harder for Challengers and Supporters to address amici's arguments in an orderly fashion.

4. Movants submit that the question formulated by this Court's order granting certiorari suggests that those who assert the invalidity of Michigan's and New York's statutory schemes—*i.e.*, that those statutes "violate the dormant Commerce Clause in light of Sec. 2 of the 21st Amendment"—should be required to set forth the bases for their challenge first. Movants therefore submit that Challengers and their amici should be realigned as petitioners for purposes of briefing these consolidated cases. Since that realignment, without more, would deprive (current) petitioners in Nos. 03-1116 and 03-1120 of the right to submit a reply brief—granting that right instead to (current) respondents in those cases—the Court should permit *both* Challengers and Supporters to submit reply briefs.

5. Movants also believe that a 21-day extension of the time within which to file the principal opening briefs for both Challengers and Supporters (and for amici supporting each party) will help the parties and amici better coordinate their efforts and will not prejudice the Court's timely consideration of these cases during October Term 2004.

6. In light of the foregoing, Movants respectfully request that this Court issue a scheduling order in these consolidated cases that directs Challengers (Swedenburg et al., petitioners in No. 03-1274, and Heald et al., respondents in No. 03-1116 and No. 03-1120) and Supporters (respondents in No. 03-1274 and

petitioners in No. 03-1116 and No. 03-1120) and their respective amici to file briefs on the merits, as well as reply briefs, in the following order:

(a) Opening Briefs for Challengers and their respective amici to be filed on or before July 29, 2004.

(b) Opening Briefs for Supporters and their respective amici to be filed on or before September 23, 2004.

(c) Challengers' Reply Briefs to be filed on or before October 28, 2004.

(d) Supporters' Reply Briefs to be filed on or before November 22, 2004.

7. Counsel for private respondents in No. 03-1274 contacted counsel for each Supporter and Challenger to ascertain their respective positions with respect to the relief sought by this motion. All parties in these cases support this motion, with two exceptions. First, Kenneth W. Starr, Esq., one of the counsel for respondents in Nos. 03-1116 and 03-1120, advised us that his clients oppose any realignment of parties and all other relief sought by Movants, with the exception of extensions of time to file the parties' principal briefs. Second, Clint Bolick, Esq., Counsel of Record for petitioners in No. 03-1274 advised us that he objects to the relief sought by Movants only

insofar as any order realigning parties would also permit Supporters to file a reply brief.

Respectfully submitted,

Miguel A. Estrada, by permission, on behalf of all movants.

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Nos. 03-1116 & 03-1120

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JENNIFER M. GRANHOLM, GOVERNOR OF MICHIGAN, *et al.*,
Petitioners,

v.

ELEANOR HEALD, *et al.*,
Respondents.

MICHIGAN BEER & WINE WHOLESALERS ASSOCIATION,
Petitioner,

v.

ELEANOR HEALD, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOINT APPENDIX

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United States District Court, No. 00-CV-71438-DT, Opinion and Order Denying Defendants' Motion to Dismiss, Denying Plaintiffs' Motion for Summary Judgment, and Granting Defendants' Motion for Summary Judgment dated September 28, 2001 ..... *25a* **25a**

United States District Court, No. 00-CV-71438-DT, Judgment dated September 28, 2001 ..... *36a* **37a**

United States District Court, No. 00-CV-71438-DT, Order Denying Plaintiffs' Motion for Reconsideration dated November 5, 2001 ..... *38a* **39a**

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U.S. DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN (DETROIT)
CIVIL DOCKET FOR CASE #: 2:00-CV-71438-BAF

* * * *

Filing Date	#	Docket Text
03/22/2000	1	COMPLAINT with - Receipt # 396367 - Date Fee Received: 3/22/00 (PP) (Entered: 03/24/2000)
04/13/2000	2	APPEARANCE for defendants John Engler, Jennifer M. Granholm and Jacquelyn Stewart of attorney Irene M. Mead (DT) (Entered: 04/14/2000)
04/13/2000	3	ANSWER by defendants John Engler, Jennifer M. Granholm and Jacquelyn Stewart to complaint [1-1] (DT) (Entered: 04/14/2000)
04/13/2000	3	AFFIRMATIVE defenses by John Engler, Jennifer M. Granholm, Jacquelyn Stewart (DT) (Entered: 04/14/2000)
04/13/2000	4	PROOF of mailing by John Engler, Jennifer M. Granholm, Jacquelyn Stewart of attorney appearance, answer to complaint and affirmative defenses (DT) (Entered: 04/14/2000)
05/01/2000	5	MOTION by movant MI Beer Wine Whlse to intervene as defendant with brief, exhibit "A", proof of mailing and notice of hearing (lh) (Entered: 05/03/2000)
05/02/2000	6	SUMMONS returned executed by process server on 3/29/00 - answer due 4/18/00 for Jennifer M. Granholm (lh) (Entered: 05/03/2000)

05/02/2000	7	SUMMONS returned executed by process server on 3/31/00 - answer due 4/20/00 for Jacquelyn Stewart (lh) (Entered: 05/03/2000)
05/02/2000	8	SUMMONS returned executed by process server on 3/29/00 - answer due 4/18/00 for John Engler (lh) (Entered: 05/03/2000)
05/02/2000	9	ORDER by Judge Bernard A. Friedman referring motion to intervene as defendant by MI Beer Wine Whlse [5-1] to Magistrate Judge Marc L. Goldman for hearing and determination [EOD Date 5/3/00] (lh) (Entered: 05/03/2000)
05/03/2000	10	EXPARTE motion by plaintiff to permit admission Pro Hac Vice of Robert D Epstein, Jeffrey L Marchal and James A Tanford with affidavits, notice of entry of ex parte order, of mailing and notice of hearing (lh) (Entered: 05/04/2000)
05/04/2000	11	NOTICE by court setting hearing date on motion to intervene as defendant by MI Beer Wine Whlse [5-1] for 1:30 5/30/00 (lh) (Entered: 05/04/2000)
05/15/2000	12	RESPONSE by defendants John Engler, Jennifer M. Granholm, Jacquelyn Stewart to motion to intervene as defendant by MI Beer Wine Whlse [5-1] with proof of mailing (dh) (Entered: 05/15/2000)
05/16/2000	13	RESPONSE by plaintiffs to motion to intervene as defendant by MI Beer Wine Whlse [5-1] with brief, proof of mailing (dh) (Entered: 05/17/2000)
05/22/2000	14	REPLY BRIEF by MI Beer Wine Whlse to responses to motion to intervene as defendant by MI Beer Wine Whlse [5-1] (DT) (Entered: 05/23/2000)

05/30/2000	15	NOTICE by Judge Friedman's chambers of setting scheduling conference for 9:30 6/22/00 (PP) (Entered: 05/31/2000)
05/30/2000		MOTION hearing held on motion to intervene as defendant by MI Beer Wine Whlse [5-1] - disposition: taken under advisement - Magistrate Judge Marc L. Goldman - tape #: 5/30/00 (gw) (Entered: 05/31/2000)
06/15/2000	16	MOTION by defendants for summary judgment with notice, brief and proof of mailing (ew) Modified on 03/29/2001 (Entered: 06/16/2000)
06/19/2000	17	NOTICE by court of setting hearing on motion for summary judgment by Jacquelyn Stewart, Jennifer M. Granholm, John Engler [16-1] for 2:00 8/23/00 (copies mailed) (lh) (Entered: 06/20/2000)
06/26/2000	18	AMENDED NOTICE from the chambers of Judge Friedman setting hearing on motion for summary judgment by Jacquelyn Stewart, Jennifer M. Granholm, John Engler [16-1] for 2:00 11/1/00 with proof of mailing (dh) (Entered: 06/27/2000)
07/07/2000	19	MOTION by plaintiff for continuance of hearing set for 11/1/00 with proof of mailing (PP) (Entered: 07/10/2000)
07/12/2000	20	REPORT and recommendation by Magistrate Judge Marc L. Goldman that motion to intervene as defendant by MI Beer Wine Whlse [5-1] be granted, with proof of mailing [EOD Date: 7/18/00] (dh) (Entered: 07/18/2000)

07/13/2000	21	ORDER by Judge Bernard A. Friedman granting motion for continuance of hearing set for 11/1/00 by plaintiffs [19-1] [EOD Date 7/18/00] (dh) (Entered: 07/18/2000)
07/17/2000	22	PROOF of mailing by plaintiffs of order granting plaintiffs' motion for continuance (dh) (Entered: 07/19/2000)
08/15/2000	23	PROOF of mailing of defendants' interrogatories, request for admissions, and request for production of documents to each of the thirteen separate (ls) (Entered: 08/16/2000)
08/16/2000	24	PROOF of mailing of defendants John Engler's and Jennifer M. Granholm's response to plaintiffs' interrogatories, response to plaintiffs' request for admissions and response to plaintiffs' request for production (ls) (Entered: 08/18/2000)
08/17/2000	25	MEMORANDUM opinion and order by Judge Bernard A. Friedman accepting and adopting report & recommendation [20-1] [EOD Date: 8/22/00] (ew) (Entered: 08/22/2000)
08/17/2000	26	JUDGMENT by Judge Bernard A. Friedman accepting and adopting report & recommendation [20-1] and, granting motion to intervene as defendant by MI Beer Wine Whlse [5-1] [EOD Date 8/22/00] (ew) (Entered: 08/22/2000)
08/21/2000	27	AGREEMENT regarding scheduling [EOD Date: 8/22/00] (ew) (Entered: 08/22/2000)

08/24/2000	28	PROOF of mailing of defendant Jacquelyn Stewarts response to plaintiffs' interrogatories; response to plaintiffs' request for admissions; and response to plaintiffs' request for production (ew) (Entered: 08/24/2000)
09/07/2000	29	MOTION by plaintiffs for leave to amend complaint civil complaint [1-1] with brief, exhibit (proposed amended complaint) and proof of mailing (lh) Modified on 09/11/2000 (Entered: 09/11/2000)
09/11/2000	30	ORDER by Judge Bernard A. Friedman referring motion for leave to amend complaint civil complaint [1-1] by plaintiffs [29-1] to Magistrate Judge Marc L. Goldman for hearing and determination [EOD Date 9/12/00] (lh) (Entered: 09/12/2000)
09/12/2000	31	NOTICE by court of setting hearing on motion for leave to amend complaint civil complaint [1-1] by plaintiffs [29-1] for 1:30 10/2/00 (lh) (Entered: 09/13/2000)
09/15/2000	32	RESPONSE by defendant John Engler, defendant Jennifer M. Granholm, defendant Jacquelyn Stewart to motion for leave to amend complaint civil complaint [1-1] by plaintiffs [29-1], with exhibits and proof of service (RH) (Entered: 09/18/2000)
09/20/2000	33	RESPONSE by movant MI Beer Wine Whlse to motion for leave to amend complaint civil complaint [1-1] by plaintiffs [29-1], with exhibit and proof of service (RH) (Entered: 09/20/2000)

09/21/2000	34	ANSWER by movant MI Beer Wine Whlse to complaint [1-1], with proof of service (RH) (Entered: 09/22/2000)
09/21/2000	34	AFFIRMATIVE defenses by movant MI Beer Wine Whlse (RH) (Entered: 09/22/2000)
09/28/2000	35	SUPPLEMENTAL brief by defendants in support of motion for summary judgment by Jacquelyn Stewart, Jennifer M. Granholm, John Engler [16-1] (ew) (Entered: 09/29/2000)
09/29/2000	36	MOTION by MI Beer Wine Whlse to dismiss with brief, exhibits and proof of mailing (lh) (Entered: 10/02/2000)
10/02/2000		MOTION hearing held on motion for leave to amend complaint civil complaint [1-1] by plaintiffs [29-1] - disposition: GRANTED - Magistrate Judge Marc L. Goldman - tape #: 10/02/00 (gw) (Entered: 10/02/2000)
10/02/2000	37	MOTION by plaintiffs for summary judgment with brief, designation of evidence, attachments and proof of mailing (lh) (Entered: 10/03/2000)
10/03/2000	38	NOTICE by court setting hearing on motion for summary judgment by plaintiffs [37-1] for 2:00 1/31/01 (copies mailed) (lh) (Entered: 10/04/2000)
10/03/2000	39	NOTICE by court of setting hearing on motion to dismiss by MI Beer Wine Whlse [36-1] for 2:00 1/31/00 (copies mailed) (lh) (Entered: 10/04/2000)

10/04/2000	45	ORDER by Magistrate Judge Marc L. Goldman granting motion for leave to amend complaint civil complaint [1-1] by plaintiffs [29-1], discovery request cutoff for 11/3/00, response to cross motion for summary judgment [37-1] [16-1] is extended until 11/3/00, supplemental motion for summary judgment is extended 12/18/00, response to any supplemental motion for summary judgment 1/5/01 and hearing on cross motions for summary judgment on 1/31/01 @ 2:00 [EOD Date 10/6/00] with proof of mailing (lh) (Entered: 10/06/2000)
10/04/2000	46	AMENDED civil complaint by plaintiff adding Malvadino Vineyards and Domaine Alfred Inc (lh) (Entered: 10/06/2000)
10/05/2000	40	MOTION by plaintiffs' to file overlong brief in opposition to defendant's motion for summary judgment with brief (lh) (Entered: 10/05/2000)
10/05/2000	41	ORDER by Judge Bernard A. Friedman granting motion to file overlong brief in opposition to defendant's motion for summary judgment by plaintiffs [40-1] [EOD Date 10/5/00] (lh) (Entered: 10/05/2000)
10/05/2000	42	RESPONSE and brief in opposition by plaintiffs' to motion for summary judgment by Jacquelyn Stewart, Jennifer M. Granholm, John Engler [16-1] with attachments (lh) Modified on 10/05/2000 (Entered: 10/05/2000)

10/05/2000	43	APPENDIX by plaintiffs to plaintiffs response and brief in opposition [42-1] to motion for summary judgment by Jacquelyn Stewart, Jennifer M. Granholm, John Engler [16-1] (lh) (Entered: 10/05/2000)
10/05/2000	44	PROOF of mailing by plaintiffs of pleadings 40 thru 43 (lh) (Entered: 10/05/2000)
10/10/2000	47	RESPONSE by plaintiffs to supplement by Jacquelyn Stewart, Jennifer M. Granholm, John Engler [35-1] with proof of mailing (ew) (Entered: 10/11/2000)
10/12/2000	48	AMENDED complaint by plaintiffs', with proof of service (RH) (Entered: 10/13/2000)
10/20/2000	49	ANSWER by defendants John Engler, Jennifer M. Granholm, Jacquelyn Stewart to amended complaint by plaintiffs [48-1] with affirmative defenses, proof of mailing (dh) (Entered: 10/23/2000)
10/20/2000	49	AFFIRMATIVE defenses by defendants John Engler, Jennifer M. Granholm, Jacquelyn Stewart (dh) (Entered: 10/23/2000)
10/20/2000	50	ANSWER by movant MI Beer Wine Whlse to amended complaint by plaintiffs [48-1] with affirmative defenses, proof of mailing (dh) (Entered: 10/23/2000)
10/20/2000	50	AFFIRMATIVE defenses by movant MI Beer Wine Whlse (dh) (Entered: 10/23/2000)

10/26/2000	51	RESPONSE by plaintiffs Eleanor Heald, Ray Heald, John Arundel, Karen Brown, Richard Brown, Bonnie McMinn, Gregory Stein, Morlan, William Horwath, Margaret Christina, Robert Christina, Trisha Hopkins, Jim Hopkins to motion to dismiss by MI Beer Wine Whlse [36-1] with brief, proof of mailing (dh) (Entered: 10/27/2000)
10/30/2000	52	PROOF of mailing by defendants' John Engler, Jennifer M. Granholm, Jacquelyn Stewart of interrogatories and request to produce documents to plaintiffs' Malvadino Vineyards, Inc., Domaine Alfred, Inc. (PP) (Entered: 10/31/2000)
11/03/2000	53	MOTION by defendant to strike affidavits with brief, attachments, notice of hearing, proof of mailing (dh) Modified on 11/03/2000 (Entered: 11/03/2000)
11/03/2000	54	RESPONSE by defendants to motion for summary judgment by plaintiffs [37-1] with brief, attachments, proof of mailing (dh) (Entered: 11/03/2000)
11/03/2000	55	REPLY by movant MI Beer Wine Whlse to response to motion to dismiss by MI Beer Wine Whlse [36-1] with proof of mailing (ew) (Entered: 11/06/2000)
11/03/2000	56	RESPONSE by movant MI Beer Wine Whlse to motion for summary judgment by plaintiffs [37-1] with attachments (ew) (Entered: 11/06/2000)
11/03/2000	57	PROOF of mailing of intervening defendant MI Beer and Wine Wholesalers Assoc's interrogatories and requests to produce to plaintiffs (ew) (Entered: 11/06/2000)

11/03/2000	58	PROOF of mailing of defendant Jennifer M. Granholm's continuing response to plaintiffs' request for production and defendants Stewart's and Granholm's continuing responses to plaintiff's interrogatories (ew) (Entered: 11/06/2000)
11/06/2000	59	NOTICE setting hearing on motion to strike affidavits by Jacquelyn Stewart, Jennifer M. Granholm, John Engler [53-1] for 2:00 1/31/01 (ew) (Entered: 11/07/2000)
11/13/2000	60	PROOF of mailing of Intervenor-Defendant Michigan Beer and Wine Wholesalers Association's Concurrence in Defendants' motion to strike affidavits to counsel of record (lh) (Entered: 11/14/2000)
11/14/2000	62	MOTION by movants Cntrl MI Univ, En MI Univ, Ferris St Univ, Lake Superior St, MI St Univ, MI Tech Univ, Saginaw Valley St, Univ MI, Wayne St Univ for leave to file amicus brief, represented by Leonard M Niehoff with brief and proof of mailing (lh) (Entered: 11/20/2000)
11/20/2000	61	REPLY by plaintiff to response to motion for summary judgment by plaintiffs [37-1], with attachments and proof of service (RH) (Entered: 11/20/2000)
11/20/2000	63	RESPONSE by plaintiffs' to motion to strike affidavits by Jacquelyn Stewart, Jennifer M. Granholm, John Engler [53-1] (RH) (Entered: 11/21/2000)
11/20/2000	64	MOTION by plaintiffs' to strike exhibits , with brief (RH) (Entered: 11/21/2000)
11/20/2000	65	PROOF of mailing by plaintiffs' of pleadings 62-64 (RH) (Entered: 11/21/2000)

11/27/2000	66	RESPONSE by defendants to motion for leave to file amicus brief, represented by Leonard M Niehoff by movants [62-1] with proof of mailing (ew) (Entered: 11/29/2000)
11/30/2000	67	RESPONSE by plaintiff to motion for leave to file amicus brief, represented by Leonard M Niehoff by movants [62-1] with proof of mailing (ew) (Entered: 12/01/2000)
11/30/2000	68	PROOF of mailing of stipulation approving MI Interfaith Counsel on Alcohol Problems' request for leave to file brief amicus curiae (ew) (Entered: 12/01/2000)
12/01/2000	69	RESPONSE by defendant John Engler, defendant Jennifer M. Granholm to motion to strike exhibits by plaintiffs [64-1], with proof of service (RH) (Entered: 12/04/2000)
12/01/2000	70	REPLY by defendant John Engler, defendant Jennifer M. Granholm to response to motion to strike affidavits by Jacquelyn Stewart, Jennifer M. Granholm, John Engler [53-1], with attachments and proof of service (RH) (Entered: 12/04/2000)
12/04/2000	71	REPLY by defendant John Engler, defendant Jennifer M. Granholm to response to motion to dismiss by MI Beer Wine Whlse [36-1], with proof of service (RH) (Entered: 12/04/2000)
12/08/2000	72	ORDER by Judge Bernard A. Friedman granting motion for leave to file amicus brief, represented by Leonard M by movants [62-1] [EOD Date 12/11/00] (RH) (Entered: 12/11/2000)

12/15/2000	73	MOTION by movant MI Beer Wine Whlse to extend time to file supplemental motion regarding summary judgment with brief, and proof of mailing. (PP) (Entered: 12/18/2000)
12/18/2000	74	MOTION by defendants' John Engler, Jennifer M. Granholm, Jacquelyn Stewart for summary judgment against plaintiff Domaine Alfred, Inc with brief, attachment A, and proof of mailing. (PP) (Entered: 12/19/2000)
12/20/2000	75	STIPULATION by plaintiff, defendant, approving Michigan Interfaith Counsel on Alcohol problems request for leave to file brief as amicus curiae [EOD Date: 12/21/00] (PP) (Entered: 12/21/2000)
12/20/2000	76	MOTION by movant MI Interfaith Cnsl for leave to file amicus brief in support of motions for summary judgment filed by defendants and motion to dismiss filed by intervening defendant (PP) (Entered: 12/21/2000)
12/20/2000	77	ORDER by Judge Bernard A. Friedman granting motion for leave to file amicus brief in support of motions for summary judgment filed by defendants and motion to dismiss filed by intervening defendant by MI Interfaith Cnsl [76-1] [EOD Date 12/21/00] (PP) (Entered: 12/21/2000)
12/20/2000	78	AMICUS curiae brief by MI Interfaith Cnsl in support of motions for summary judgment filed by defendants and motion to dismiss filed by intervening defendant, with exhibit A. (PP) (Entered: 12/21/2000)

12/21/2000	79	NOTICE by Judge Friedman's chambers of setting hearing on motion for summary judgment against plaintiff Domaine Alfred, Inc by Jacquelyn Stewart, Jennifer M. Granholm, John Engler [74-1] for 2:00 1/31/01 (PP) (Entered: 12/22/2000)
12/22/2000	80	ORDER by Judge Bernard A. Friedman with stipulation, extending time to file supplemental motions/briefs regarding summary judgment, setting deadline for filing motions for 12/27/00 [EOD Date: 12/27/00] (ew) (Entered: 12/27/2000)
12/27/2000	81	SUPPLEMENT by movant MI Beer Wine Whlse motion to dismiss by MI Beer Wine Whlse [36-1] with brief and proof of mailing (ew) Modified on 12/29/2000 (Entered: 12/28/2000)
01/08/2001	82	RESPONSE in opposition by plaintiffs to supplemental motion for summary judgment against plaintiff Domaine Alfred, Inc by John Engler, Jennifer M. Granholm, Jacquelyn Stewart [74-1] with brief (dh) (Entered: 01/09/2001)
01/08/2001	83	MOTION by plaintiffs to strike exhibit D in support of supplemental motion for summary judgment with brief (dh) (Entered: 01/09/2001)
01/08/2001	84	PROOF of mailing by plaintiffs of pleadings 82,83 (dh) (Entered: 01/09/2001)
01/09/2001	85	STIPULATION by all parties of voluntary dismissal regarding Malvadino Vineyards, Inc without prejudice [EOD Date: 1/10/01] (dh) (Entered: 01/10/2001)

01/11/2001	86	SUPPLEMENT by plaintiffs to second motion to strike exhibit D in support of supplemental motion for summary judgment by plaintiffs [83-1] with consent of intervening defendant, attachment, proof of mailing (dh) (Entered: 01/12/2001)
02/02/2001	87	LETTER by counsel for John Engler, Jennifer M. Granholm, Jacquelyn Stewart rescheduling motion arguments on motion for summary judgment against plaintiff Domaine Alfred, Inc by John Engler, Jennifer M. Granholm, Jacquelyn Stewart [74-1] motion to strike affidavits by John Engler, Jennifer M. Granholm, Jacquelyn Stewart [53-1], motion for summary judgment by plaintiffs [37-1] and motion to dismiss by MI Beer Wine Whlse [36-1] for 2:00 3/14/01 (lh) (Entered: 02/06/2001)
03/29/2001	88	MOTION by plaintiff for continuance with proof of mailing (dh) (Entered: 03/30/2001)
06/11/2001	89	NOTICE by plaintiffs of additional legal authority in support of motion for summary judgment by plaintiffs [37-1] with proof of mailing (lh) (Entered: 06/12/2001)
06/13/2001		MOTION hearing held on motion for summary judgment against plaintiff Domaine Alfred, Inc by John Engler, Jennifer M. Granholm, Jacquelyn Stewart [74-1], motion for summary judgment [37-1], motion to dismiss by MI Beer Wine Whlse [36-1] - disposition: taken under advisement - Judge Bernard A. Friedman - Court Reporter: Joan Morgan (cd) (Entered: 06/14/2001)

07/25/2001	90	NOTICE by defendants of additional legal authority with attachments and proof of mailing (LS) (Entered: 07/26/2001)
09/27/2001	92	JUDGMENT entered by Judge Bernard A. Friedman for defendants and against plaintiffs [EOD Date: 9/28/01] (lh) (Entered: 09/28/2001)
09/28/2001	91	OPINION and order by Judge Bernard A. Friedman denying motion for summary judgment by plaintiffs and that plaintiffs' request for injunctive and declaratory relief are denied [37-1], denying defendants' motions to dismiss pr for summary judgment due to lack of standing or for lack of subject matter jurisdiction are denied and that defendants' motions for summary judgment on the merits are granted [74-1] [16-1] and that the remaining motions are denied as moot [88-1] [83-1] [73-1] [64-1] [53-1] [36-1] [EOD Date: 9/28/01] (lh) (Entered: 09/28/2001)
10/15/2001	93	MOTION by plaintiffs' for reconsideration of summary judgment after ruling on evidentiary motions with brief and proof of mailing (lh) Modified on 10/15/2001 (Entered: 10/15/2001)
11/05/2001	94	ORDER by Judge Bernard A. Friedman denying motion for reconsideration of summary judgment after ruling on evidentiary motions by plaintiffs [93-1] with proof of mailing [EOD Date 11/6/01] (dh) (Entered: 11/06/2001)
12/04/2001	95	APPEAL by plaintiff of orders [94-1] and [91-1] to USCA - FEE: PAID - Receipt #: 428817 (do) (Entered: 12/06/2001)

12/06/2001	96	PROOF of mailing of notice of appeal to USCA, counsel and court reporter of record (do) (Entered: 12/06/2001)
12/06/2001	97	CERTIFIED copy of appeal notice by plaintiffs [95-1] and docket transmitted to USCA (do) (Entered: 12/06/2001)
12/17/2001	98	TRANSCRIPT order form by Domaine Alfred Inc, Malvadino Vineyards regarding appeal notice by plaintiffs [95-1] requesting transcript(s) of: no hearings (dh) (Entered: 12/18/2001)
12/28/2001	99	ACKNOWLEDGMENT from USCA of receipt of appeal notice by plaintiffs [95-1] - appeal case # 01-2720 (RH) (Entered: 01/02/2002)
09/04/2003	100	SLIP opinion from USCA reversing the judgment of district court and remanding the case for entry of judgment on favor of plaintiffs - appeal case # 01 2720 (lh) Modified on 09/26/2003 (Entered: 09/05/2003)
09/04/2003	101	NON-CERTIFIED copy of order from USCA reversing the judgment of district court and remanding the case for entry of judgment in favor of plaintiffs - appeal case # 01-2720 (lh) (Entered: 09/05/2003)
09/08/2003	102	JUDGMENT entered by Judge Bernard A. Friedman for plaintiffs and against defendants with proof of service [EOD Date: 9/9/03] (dh) (Entered: 09/09/2003)
09/16/2003	103	NOTICE by movant MI Beer Wine Whlse of for joinder in defendant's motion for relief from judgment and/or recommendation (not on docket) with attachments, and proof of service. (PP) (Entered: 09/17/2003)

09/17/2003	104	MOTION by plaintiff to extend time to file affidavits in support of motion for attorney fees with attachment, and proof of service. (PP) (Entered: 09/18/2003)
09/17/2003	105	MOTION by plaintiffs' for attorney fees with brief, attorney affidavits', and proof of service. (PP) (Entered: 09/18/2003)
09/18/2003	106	MOTION by defendant relief from judgment, for reconsideration of order judgment [102-1] with brief, attachments, and proof of service. (PP) (Entered: 09/22/2003)
09/25/2003	107	ORDER by Judge Bernard A. Friedman granting motion relief from judgment by John Engler, Jennifer M. Granholm, Jacquelyn Stewart [106-1]; granting motion for reconsideration of order judgment [102-1] by John Engler, Jennifer M. Granholm, Jacquelyn Stewart [106-2] and vacating order judgment [102-1] [EOD Date 9/26/03] (RH) (Entered: 09/26/2003)
10/06/2003	108	JOINT RESPONSE by defendants and intervening defendant to motion for attorney fees by Domaine Alfred Inc [105-1] with proof of service (lh) (Entered: 10/08/2003)
10/06/2003	108	REQUEST by defendants and intervening defendants for additional time to response to said motion with proof of service (lh) (Entered: 10/08/2003)
12/03/2003	109	CERTIFIED copy of order from USCA staying the mandate for 90 days to allow time to file a petition for writ of certiorari case [0-0] - appeal case # 01-2720 (RH) (Entered: 12/04/2003)

02/25/2004	110	LETTER from SC re [95] Notice of Appeal filed - petition for writ of certiorari placed on docket [Appeal Case Number 03-1120] (LBeh,) (Entered: 02/27/2004)
02/25/2004	111	LETTER from SC re [95] Notice of Appeal - petition for writ of certiorari placed on docket [Appeal Case Number 03-1116] (LBeh,) (Entered: 02/27/2004)
06/07/2004	112	LETTER from SC re [95] Notice of Appeal - petition for writ of certiorari is granted - limited and consolidated with nos. 03-1120 and 03-1274. [Appeal Case Number 03-1116] (LBeh,) (Entered: 06/10/2004)
06/28/2004	113	ORDER denying without prejudice 104 Motion for additional time to submit affidavits in support of motion for attorney fees and 105 Motion for attorney fees. Signed by Honorable Bernard A Friedman. (DPer,) (Entered: 06/29/2004)

GENERAL DOCKET
US COURT OF APPEALS FOR THE SIXTH CIRCUIT

COURT OF APPEALS DOCKET #: 01-2720 FILED: 12/20/01

NSUIT: 3950 CONSTITUTIONAL - STATE STATUTE

HEALD; ET AL. V. ENGLER; ET AL.

APPEAL FROM: EASTERN DISTRICT OF MICHIGAN AT DETROIT

* * * *

12/20/01	Civil Case Docketed. Notice filed by Appellant Eleanor Heald, Appellant Ray Heald, Appellant John Arundel, Appellant Karen Brown, Appellant Richard Brown, Appellant Bonnie McMinn, Appellant Gregory Stein, Appellant Michelle Morlan, Appellant William Horwath, Appellant Margaret Christina, Appellant Robert Christina, Appellant Trisha Hopkins, Appellant Jim Hopkins, Appellant Domaine Alfred Inc. Transcript needed: y (ert)
1/2/02	TRANSCRIPT ORDER FORM filed by James A. Tanford for Appellants. Transcript not needed. [01-2720] [2591509-1] (ert)
1/2/02	APPEARANCE filed by Attorney James A. Tanford for Appellants Eleanor Heald, et al [01-2720] (ert)
1/2/02	PRE-ARGUMENT STATEMENT filed by James A. Tanford for Appellant Domaine Alfred Inc, Appellant Jim Hopkins, Appellant Trisha Hopkins, Appellant Robert Christina, Appellant Margaret Christina, Appellant William Horwath, Appellant Michelle Morlan, Appellant Gregory Stein, Appellant Bonnie McMinn, Appellant Richard Brown, Appellant Karen Brown, Appellant John Arundel, Appellant Ray Heald, Appellant Eleanor Heald [01-2720] (ert)

1/2/02 APPEARANCE filed by Attorney Irene M. Mead for Appellee Jacquelyn Stewart, Appellee Jennifer M. Granholm, Appellee John Engler [01-2720] (ert)

1/2/02 APPEARANCE filed by Attorney Anthony S. Kogut for Appellee MI Wine & Beer [01-2720] (ert)

1/3/02 BRIEFING LETTER SENT setting briefing schedule: appellant brief due 2/12/02; appellee brief due 3/14/02; appendix 4/4/02; final briefs due 4/25/02; . (ert)

1/4/02 Mediation Office is involved in this appeal. [01-2720] (ert)

2/1/02 Mediation Office is no longer involved in this appeal at this time. (ert)

2/14/02 PROOF BRIEF filed by James A. Tanford for Appellant Domaine Alfred Inc, Appellant Jim Hopkins, Appellant Trisha Hopkins, Appellant Robert Christina, Appellant Margaret Christina, Appellant William Horwath, Appellant Michelle Morlan, Appellant Gregory Stein, Appellant Bonnie McMinn, Appellant Richard Brown, Appellant Karen Brown, Appellant John Arundel, Appellant Ray Heald, Appellant Eleanor Heald. Certificate of service date 2/12/02 Number of Pages: 40. [01-2720] (ert)

2/14/02 Request to require oral argument filed by James A. Tanford for Appellant Domaine Alfred Inc, Appellant Jim Hopkins, Appellant Trisha Hopkins, Appellant Robert Christina, Appellant Margaret Christina, Appellant William Horwath, Appellant Michelle Morlan, Appellant Gregory Stein, Appellant Bonnie McMinn, Appellant Richard Brown, Appellant Karen Brown, Appellant John Arundel, Appellant Ray Heald, Appellant Eleanor Heald [01-2720] (ert)

2/22/02 APPEARANCE filed by Attorney Clint Bolick for Amicus Curiae Juanita Swedenburg, Amicus Curiae Swedenburg Winery, Amicus Curiae David Lucas, Amicus Curiae Lucas Winery [01-2720] (lead) (ert)

2/22/02 APPEARANCE filed by Attorney Wiliam H. Mellor for Amicus Curiae Juanita Swedenburg, Amicus Curiae Swedenburg Winery, Amicus Curiae David Lucas, Amicus Curiae Lucas Winery [01-2720] (ert)

2/22/02 APPEARANCE filed by Attorney Steven M. Simpson for Amicus Curiae Juanita Swedenburg, Amicus Curiae Swedenburg Winery, Amicus Curiae David Lucas, Amicus Curiae Lucas Winery [01-2720] (ert)

2/22/02 BRIEF filed by Steven M. Simpson for Amicus Curiae Juanita Swedenburg, Amicus Curiae Swedenburg Winery, Amicus Curiae David Lucas, Amicus Curiae Lucas Winery, Wiliam H. Mellor for Amicus Curiae Juanita Swedenburg, Amicus Curiae Swedenburg Winery, Amicus Curiae David Lucas, Amicus Curiae Lucas Winery, Clint Bolick for Amicus Curiae Juanita Swedenburg, Amicus Curiae Swedenburg Winery, Amicus Curiae David Lucas, Amicus Curiae Lucas Winery. Copies 7. Certificate of service date 2/21/02. Number of Pages: 17. [01-2720] WITH CONSENT OF PARTIES in support of the appellants (ert)

3/14/02 PROOF BRIEF filed by Irene M. Mead for Appellee Jacquelyn Stewart, Appellee Jennifer M. Granholm, Appellee John Engler. Certificate of service date 3/11/02. Number of Pages: 48. [01-2720] (ert)

3/14/02 Request to require oral argument filed by Irene M. Mead for Appellee Jacquelyn Stewart, Appellee Jennifer M. Granholm, Appellee John Engler [01-2720] (ert)

3/15/02 PROOF BRIEF filed by Anthony S. Kogut for Appellee MI Wine & Beer. Certificate of service date 3/14/02 . Number of Pages: 49. [01-2720] (ert)

3/15/02 Request to require oral argument filed by Anthony S. Kogut for Appellee MI Wine & Beer [01-2720] (ert)

3/22/02 APPEARANCE filed by Attorney Louis R. Cohen for Amicus Curiae Wine & Spirits; et al [01-2720] (ert)

3/22/02 BRIEF filed by Louis R. Cohen for Amicus Curiae Wine & Spirits. Copies 7. Certificate of service date 3/20/02. [01-2720] (ert)

3/29/02 PROOF REPLY BRIEF filed by James A. Tanford for Appellant Domaine Alfred Inc, Appellant Jim Hopkins, Appellant Trisha Hopkins, Appellant Robert Christina, Appellant Margaret Christina, Appellant William Horwath, Appellant Michelle Morlan, Appellant Gregory Stein, Appellant Bonnie McMinn, Appellant Richard Brown, Appellant Karen Brown, Appellant John Arundel, Appellant Ray Heald, Appellant Eleanor Heald Certificate of service date 3/28/02 [01-2720] (ert)

4/5/02 Appellant MOTION filed to file substitute brief. Motion filed by James A. Tanford for Appellant Eleanor Heald, et al. Certificate of service date 4/4/02 [01-2720] (ert)

4/5/02 RULING granting motion to file substitute brief [2591558-1] filed by James A. Tanford [01-2720] (LG/jy/rfg;cm-4/5/02) . (ert)

4/5/02 Corrected appellant proof brief filed by James A. Tanford. Copies: 1. Certificate of Service date 4/4/02 [01-2720] Replaces brief filed 2/14/02 (ert)

4/5/02 Request to require oral argument filed by James A. Tanford for Appellants [01-2720] (ert)

4/8/02 APPENDIX filed by James A. Tanford for Appellants. Copies: 6. Certificate of service date 4/4/02 [01-2720] (ert)

4/9/02 BRIEFING LETTER SENT requesting appendix corrections from James A. Tanford because complaint, etc.., resetting briefing schedule: corrected appx due 4/16/02; finals now due 5/30/02 [01-2720] . (ert)

4/18/02 Corrected appendix filed by James A. Tanford. Copies: 5. Certificate of Service date 4/16/02 [01-2720] (ert)

4/18/02 BRIEFING LETTER SENT resetting briefing schedule: final brief now due 4/30/02 [01-2720]. (ert)

4/26/02 Appellant MOTION filed to file substitute appendix. Motion filed by James A. Tanford for Appellants. Certificate of service date 4/25/02 [01-2720] (ert)

4/26/02 Corrected appendix filed by James A. Tanford. Copies: 5. 2 volumes. Certificate of Service date 4/25/02 [01-2720] (ert)

4/29/02 RULING granting motion to file substitute appendix [2591567-1] filed by James A. Tanford [01-2720] resetting briefing schedule: [01-2720] final briefs now due 5/13/02. (ert)

5/6/02 FINAL BRIEF filed by Irene M. Mead for Appellee Jacquelyn Stewart, Appellee Jennifer M. Granholm, Appellee John Engler. Copies: 7. Certificate of service date 5/2/02. Number of Pages: 48. [01-2720] (ert)

5/6/02 Request to require oral argument filed by Irene M. Mead for Appellee Jacquelyn Stewart, Appellee Jennifer M. Granholm, Appellee John Engler [01-2720] (ert)

5/13/02	FINAL BRIEF filed by James A. Tanford for Appellants. Copies: 7. Certificate of service date 5/9/02 Number of Pages: 40. [01-2720] (ert)
5/13/02	Request to require oral argument filed by James A. Tanford for Appellants. [01-2720] (ert)
5/13/02	FINAL REPLY BRIEF filed by James A. Tanford for Appellants. Eleanor Heald, et al. Copies: 7 Certificate of service date 5/9/02 Number of Pages: 26. [01-2720] (ert)
5/14/02	FINAL BRIEF filed by Anthony S. Kogut for Appellee MI Wine & Beer. Copies: 7. Certificate of service date 5/13/02. Number of Pages: 49. [01-2720] (ert)
5/14/02	Request to require oral argument filed by Anthony S. Kogut for Appellee MI Wine & Beer [01-2720] (ert)
7/22/02	ADDITIONAL CITATION filed by James A. Tanford for Appellant Eleanor Heald, et al Certificate of service date 7/19/02 [01-2720] (ert)
9/3/02	Attorney LETTER filed regarding dates unavailable for oral argument (Oct. 9 thru Nov 1). Letter from James A. Tanford. Dated: 8/29/02 [01-2720] (dtk)
1/8/03	ADDITIONAL CITATION filed by James A. Tanford for the Appellants. Dated: 1/6/03 [01-2720] (dtk)
2/2/03	Attorney LETTER filed by the appellees John Engler, Jennifer Granholm, Jacquellyn Steward, and MI Wine & Beer notifying the court they filed a Petition for Writ of Cer 1/30/04. Letter from Donald S. McGehee. Certificate of service date [01-2720] (dtk)
2/6/03	Attorney LETTER filed regarding dates unavailable for oral argument (March 15-23 and July 21-Aug 2, 2003). Letter from James A. Tanford. Dated: 2/3/03 [01-2720] (dtk)

3/7/03	APPEARANCE filed by Attorney Donald S. McGehee (Lead) for Appellees John Engler, Jennifer M. Granholm, Jacquelyn Stewart, and MI Wine & Beer [01-2720] (dtk)
3/13/03	Oral argument date set for May 7, 2003 in court room 403. Notice of argument sent to counsel. [01-2720] (rld)
4/14/03	ADDITIONAL CITATION filed by Donald S. McGehee for the Appellees. Dated: 4/11/03 [01-2720] (dtk)
4/25/03	ADDITIONAL CITATION filed by James A. Tanford for the appellants. Dated: 4/22/03 [01-2720] (dtk)
5/7/03	CAUSE ARGUED on 5/7/03 by James A. Tanford for Appellant Eleanor Heald, Appellant Ray Heald, Appellant John Arundel, Appellant Karen Brown, Appellant Richard Brown, Appellant Bonnie McMinn, Appellant Gregory Stein, Appellant Michelle Morlan, Appellant William Horwath, Appellant Margaret Christina, Appellant Robert Christina, Appellant Trisha Hopkins, Appellant Jim Hopkins, Appellant Domaine Alfred Inc, Donald S. McGehee for Appellee John Engler, Appellee Jennifer M. Granholm, Appellee Jacquelyn Stewart, Appellee MI Wine & Beer, Anthony S. Kogut for Appellee MI Wine & Beer before Judges Guy, Boggs, Daughtrey. [01-2720] (me)
6/30/03	ADDITIONAL CITATION filed by James A. Tanford for Appellant Eleanor Heald, et al. Certificate of service date 6/27/03 [01-2720] (blc)
7/9/03	ADDITIONAL CITATION filed by James A. Tanford for the Appellants. Dated: 7/8/03 [01-2720] (dtk)

8/28/03	OPINION filed: The judgment of the district court granting summary judgment to the defendants is REVERSED, and the case is REMANDED for the entry of judgment in favor of the plaintiffs. Decision for publication pursuant to local rule 206 [01-2720]. Ralph B. Guy and Danny J. Boggs, Circuit Judges, Martha C. Daughtrey, Authoring Judge. (dtk)
8/28/03	JUDGMENT: REVERSED and REMANDED. (dtk)
9/10/03	PETITION for en banc rehearing filed by Anthony S. Kogut for Appellee MI Wine & Beer. Certificate of service date 9/9/03. [01-2720] (blh)
9/11/03	ADDITIONAL PETITION for en banc rehearing filed by Donald S. McGehee for Appellees John Engler, Jennifer M. Granholm, Jacquelyn Stewart, MI Wine & Beer. Certificate of service date 9/10/03. [01-2720] (blh)
11/4/03	ORDER filed denying petition for en banc rehearing [2813334-1] filed by Donald S. McGehee [01-2720], and petition for en banc rehearing [2812774-1] filed by Anthony S. Kogut [01-2720]. Danny J. Boggs, Ralph B. Guy, Martha C. Daughtrey, Circuit Judges. (blh)
11/10/03	Appellee MOTION filed to stay mandate pending a petition for writ of certiorari. Motion filed by Anthony S. Kogut for Appellee MI Wine & Beer. Certificate service date 11/7/03 . [01-2720] (dtk)
11/10/03	Appellee MOTION filed to stay mandate pending petition for writ of certiorari. Motion filed by Donald S. McGehee for Appellees John Engler, Jennifer M. Granholm, Jacquelyn Stewart, and MI Wine & Beer. Certificate of service date 11/7/03. [01-2720] (dtk)

11/21/03	ORDER filed granting motion to stay mandate for 90 days [2849500-1] [2849521-1] filed by Anthony S. Kogut and Donald S. McGehee [01-2720] Entered by order of the court. (dtk)
2/2/04	Attorney LETTER filed by appellee Michigan Beer and Wine Wholesaler Assn notifying the court that a Petition for Writ of Certiorari was filed 2/2/04. Letter from Anthony S. Kogut. Certificate of service date 2/2/04 [01-2720] (dtk)
2/5/04	Attorney LETTER filed notifying the court that a Petition for Writ of Cert has been filed. Letter from Donald McGehee for the appellees John Engler, MI Wine and Beer, Jennifer Granholm and Jacquelyn Stewart. [01-2720]. Certificate of service date 2/2/04 [01-2720] (dtk)
2/9/04	U.S. Supreme Court notice filed regarding petition for writ of certiorari filed by Appellee Jennifer M. Granholm, et al. . Filed in the Supreme Court on 01-30-04, Supreme Ct. case number: 03-1116. [01-2720] (Petition #1) (swh)
2/9/04	U.S. Supreme Court notice filed regarding petition for writ of certiorari filed by Amicus Curiae Wine & Spirits. Filed in the Supreme Court on 02-02-04, Supreme Ct. case number: 03-1120. [01-2720] (petition #2) (swh)
5/28/04	U.S. Supreme Court letter filed: limited granting petition for writ of certiorari [2898939-1] filed by Jennifer M. Granholm as to one question, [01-2720] Supreme Court Nos. 03-1116 and 03-1120., . Filed in the Supreme Court on 05-24-04. (swh)

(Order List: 541 U.S.)

MONDAY, MAY 24, 2004

* * * *

CERTIORARI GRANTED

* * * *

03-1116) GRANHOLM, GOV. OF MI, ET AL. V. HEALD, ELEANOR, ET AL.

03-1120) MI BEER & WINE WHOLESALERS V. HEALD, ELEANOR, ET AL.

03-1274) SWEDENBURG, JUANITA, ET AL. V. KELLY, EDWARD D., ET AL.

The petitions for writs of certiorari are granted limited to the following Question: "Does a State's regulatory scheme that permits in-state wineries directly to ship alcohol to consumers but restricts the ability of out-of-state wineries to do so violate the dormant Commerce Clause in light of Sec. 2 of the 21st Amendment?" These cases are consolidated and a total of one hour is allotted for oral argument.

* * * *

Supreme Court, U.S.
FILED
JUL 29 2004
OFFICE OF THE CLERK

No. 03-1116

In The Supreme Court of the United States

JENNIFER M. GRANHOLM, Governor; et al.,

Petitioners,

v.

ELEANOR HEALD, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE PETITIONERS

Michael A. Cox
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QUESTION PRESENTED

Does a State's regulatory scheme that permits in-state wineries directly to ship alcohol to consumers but restricts the ability of out-of-state wineries to do so violate the dormant Commerce Clause in light of Sec. 2 of the 21st Amendment?

PARTIES TO THE PROCEEDINGS

Petitioners in Case No. 03-1116, Defendants-Appellees below, are State of Michigan officials including the Governor, the Michigan Attorney General, and the Chair of the Liquor Control Commission. The Petitioners will be referred to collectively as "Michigan." The current holders of those offices have been automatically substituted as parties for the former office holders pursuant to Sup. Ct. R. 35.3.

The Michigan Beer and Wine Wholesalers Association intervened as a Defendant below and therefore is a Respondent in No 03-1116, S. Ct. Rule 12.6, but it has not filed briefs in this Court under that docket number. Its interests are not adverse to the interests of Petitioners in Case No. 03-1116. It is Petitioner in Case No. 03-1120.

Respondents in Case Nos. 03-1116 and 03-1120, Plaintiffs-Appellants below, include Eleanor Heald, Ray Heald, John Arundel, Karen Brown, Richard Brown, Bonnie McMinn, Gregory Stein, Michelle Morlan, William Horwath, Margaret Christina, Robert Christina, Trisha Hopkins, Jim Hopkins and Domaine Alfred, Inc. The thirteen individual Respondents are Michigan residents. Respondent, Domaine Alfred, Inc., is a California winery. The Respondents will be referred to collectively as "the Healds."

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- B. Section 2 of the 21st Amendment is controlling because its language is plain and unambiguous and its meaning clear. 17
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OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals is reported at 342 F.3d 517 (6th Cir. 2003). Pet. App. 1a-18a. The opinion of the District Court is unreported as is the judgment and order denying reconsideration. Pet. App. 25a-39a.

JURISDICTION

The Court of Appeals judgment was entered on August 28, 2003. Pet. App. 19a-20a. That Court denied rehearing en banc on November 4, 2003. Pet. App. 21a-22a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). Certiorari was granted on May 24, 2004.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause, U.S. Const. art. 1, § 8, cl. 3, provides, in pertinent part:

> The Congress shall have power . . .
> * * *
> To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;

The 21st Amendment, U.S. Const. amend. XXI, provides, in pertinent part:

> Sec. 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.
>
> Sec. 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of

intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

27 U.S.C. § 122, the Webb-Kenyon Act, Pet. App. 44a, provides:

> The shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind from one State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory, or district of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the Untied States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited.

The applicable Michigan statutes, and administrative rules, are Const. 1963, art. 4, § 40, Michigan Compiled Laws (MCL) §§ 436.1109; 436.1111; 436.1113; 436.1203; 436.1537; 436.1603; 436.1605; 436.1607; 436.1701; 436.1801; 436.1903; 436.1909; and Mich. Admin. Code Rules 436.1515; 436.1719. Pet. App. 45a-71a.

STATEMENT OF THE CASE

A. Introduction

Michigan's alcohol regulatory scheme permits licensed, in-State wine producers to ship their product directly to consumers within the State but restricts the ability of unlicensed, out-of-State wineries to do so. The question presented in this case is whether Michigan's scheme violates the dormant Commerce Clause in light of the 21st Amendment.

Michigan answers that the 21st Amendment and the Webb-Kenyon Act, 27 U.S.C. § 122 (1935) gives States the right to control "importation" and "transportation" of intoxicating liquors free of traditional dormant Commerce Clause restraints.[1]

The Healds answer that if a State allows highly regulated in-State licensees to transport alcoholic beverages to in-State consumers, then a State must also allow out-of-State suppliers that same ability or it will be repugnant to the dormant Commerce Clause despite the 21st Amendment.[2]

B. Michigan System

Under the authority provided by the 21st Amendment, the Michigan Legislature created the Michigan Liquor Control Commission ("MLCC" or "Commission") and granted it the sole right, power and duty to control the alcoholic beverage traffic, including the manufacture, importation, possession,

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[1] The Second and Seventh Circuits are in accord with this position. *Swedenburg v. Kelly*, 358 F.3d 223 (2nd Cir. 2004) and *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000), *cert. denied, sub nom., Bridenbaugh v. Carter*, 532 U.S. 1002 (2001).

[2] The Sixth, Fifth and Fourth Circuits are in accord with this position. *Heald v. Engler*, 342 F.3d 517 (6th Cir. 2003), *Dickerson v. Bailey*, 336 F.3d 388 (5th Cir. 2003), *Beskind v. Easley*, 325 F.3d 506 (4th Cir. 2003).

transportation, sale and licensing within the State. Mich. Const. 1963, art. 4, § 40; MCL 436.1203.

After prohibition ended in 1933, each State made a choice whether to become a "control" state or a "license" State in terms of the sale and distribution of alcohol. In licensed States, wholesalers and retail sales of alcohol are wholly in the hands of private enterprise. Control States differ in that the State itself is involved in some aspect of the merchandising cycle of one or more types of alcoholic beverage. Both control and license States strictly enforce and license businesses selling alcohol. Michigan is one of eighteen control states.[3] It has a unique blend of public and private enterprise involved in its beverage alcohol distribution system. The Commission is responsible for ordering and buying spirits[4] from suppliers and selling and delivering it to retail licensees. Unlike spirits, beer and wine is purchased from licensed manufacturers and distributed by licensed private wholesalers to licensed retailers.[5]

Persons or entities wishing to manufacture, sell, possess or transport alcohol in the State must apply to the Commission and receive the appropriate license. MCL 436.1203. Specifically, MCL 436.1203(1) and 436.1203(2); Pet. App. 49a-52a provide, in pertinent part:

> (1) Except as provided in this section and section 301, a sale, delivery, or importation of alcoholic liquor, including alcoholic liquor for personal use, shall not be made in this state unless the sale, delivery, or importation is made by the commission, the commission's authorized agent or distributor, an authorized distribution agent approved by order of the

[3] http://www2.state.id.us/isld/nabcalinks.htm (Last visited 7/20/04).
[4] In Michigan, spirits (i.e. hard liquor) are distributed by the State through special appointed distribution agents. MCL 436.1105(3)(a)-(c).
[5] MCL 436.1113.

> commission, a person licensed by the commission, or by prior written order of the commission. All spirits for sale, use, storage, or distribution in this state, shall originally be purchased by and imported into the state by the commission, or by prior written authority of the commission
>
> (2) For purposes of subsection (1), the sale, delivery, or importation of alcoholic liquor includes, but is not limited to, to the sale, delivery, or importation of alcoholic liquor transacted or caused to be transacted by means of any mail order, internet, telephone, computer, device, or other electronic means. Subject to subsection (3), if a retail sale, delivery, or importation of alcoholic liquor occurs by such means, the retailer must comply with all of the following:
>
> (a) Be appropriately licensed under the laws of this state.
> (b) Pay any applicable taxes to the commission.
> (c) Comply with all prohibitions of the laws of this state including, but not limited to, sales to minors.
>
> * * *

In order to obtain alcoholic beverages in Michigan, consumers must purchase from licensed retailers within the State.[6] Michigan's retail licensees are divided into two classes: on-premises, where alcohol is consumed at the licensed

[6] MCL 436.1111(5), MCL 436.1203(2). Consumers also may personally transport into Michigan up to one case per day of wine or beer purchased outside the state for their own use and consumption. MCL 436.1203(7)(a) If a consumer wishes to purchase alcohol by Internet, catalog, or telephone, the order may be placed outside the state as long as a licensed, accountable Michigan retailer fills it. MCL 436.1203(7)(b) and MCL 436.1203(1).

premises,[7] and off-premises, where alcohol is purchased for consumption elsewhere.[8] This case deals only with off-premises licensees.

Michigan, like many other States, adopted a three-tier distribution system for wine and beer. Michigan's three-tier distribution system requires that licensed manufacturers, whether located in Michigan or not (the first tier), sell to licensed wholesalers (the second tier), who then sell to licensed in-State retailers (the third tier), who then sell to consumers.[9] Michigan's law does not authorize out-of-State suppliers (*i.e.*, manufacturers, wholesalers or retailers) of alcoholic beverages (such as wine) to sell and transport alcoholic beverages from out-of-State directly to Michigan residents without first passing through an in-State licensee. See Mich. Admin. Code r. 436.1057 ("A person shall not deliver, ship, or transport into this state beer, wine, or spirits without a license authorizing such action, except in accordance with r. 436.1722, or without the prior written approval of the commission.")

In addition to the traditional type of retailer that sells various alcoholic beverage products, Michigan law provides for wine maker and microbrewery licenses that do not fall

[7] Examples are bars and taverns. Bars generally have class C licenses and can sell at retail beer, wine, mixed spirit drink, and spirits for consumption on the premises. MCL 436.1107(2). Many other license classifications exist under Michigan's Liquor Control Code, and it is not uncommon for an entity to hold more than one classification. For example see MCL 436.1107(2)-(11).

[8] Examples are liquor and grocery stores. These entities must have Specially Designated Merchant (SDM) and/or Distributor (SDD) licenses allowing them to sell beer and wine (SDM), MCL 436.1111(12) or hard liquor (SDD), MCL 436.1111(12), for consumption off the premises.

[9] First tier, manufacturer: MCL 436.1109(1), MCL 436.1607(1), Pet. App 45a, 59a; Second tier, wholesaler: MCL 436.1113(7), Mich. Admin. Code r. 436.1719(5), Pet. App. 49a, 70a; and Third tier, retailer: MCL 436.1111(5), MCL 436.1113(9), Pet. App. 47a, 49a.

precisely within the traditional three-tier structure.[10] A Michigan winery may produce wines for consignment to Michigan wholesalers, thus operating in the manufacturer tier. It also may act as wholesaler for its own wines, providing them to retailers for sale to consumers. Finally, an in-State winery may sell its own product directly to consumers at the winery or direct ship it to their residences. As a licensed retailer of its product it may sell to consumers in the state in accordance with the Commission rules. MCL 436.1111(5). With respect to other wine or alcohol products, Michigan wine makers and microbreweries, like everyone else, operate directly in the three-tier system. See MCL 436.1305(1)(b).

Michigan has chosen to except in-State wineries from some aspects of the three-tier system because regulatory control over these in-State manufacturers is practical for purposes of collecting taxes and because the State can assess meaningful sanctions for violations of State law.[11] See *Bainbridge v. Turner*, 311 F.3d 1104, 1116 (11th Cir. 2002), (Roney, J., dissenting). Michigan in-State wineries selling at retail are subject to a strict regulatory licensing regimen that includes strict liability for sales to minors and intoxicated persons, auditing and tax collection. MCL 436.1801(3). App. 63a-66a.

However, beer and wine may not be imported, shipped or transported into Michigan without first going through a

[10] MCL 436.1113(9)(Wine maker), Mich. Admin. Code r. 436.1109(2) (Microbrewery). MCL 436.1501-436.1543 and the Mich. Admin. Code r. 436.1104-436.1149 set forth the general qualifications for licensing. Pet App 49a.

[11] In this new era of wireless and Internet communications, the States' task of regulating the out-of-state flow of alcohol shipments has become more complicated and burdensome. Beverage alcohol products are now only a "click away." Over 21,000 wineries are accessible over the Internet, including 3397 in this country. This figure does not include other suppliers and retailers of alcoholic beverages who are reachable over the Internet. In contrast, Michigan has only 40 in-state winemakers to regulate. http://www.wineweb.com/scripts/wineryCount.cfm. (Last visited 6/22/04). http://www.michiganwines.com. (Last visited 6/22/04).

licensed in-state wholesaler unless otherwise authorized by Commission order. MCL 436.1203(1).[12] Out-of-State retailers or wineries may not direct ship to consumer's doorsteps and there is no available licensing classification authorizing them to do so. *Id.*

To the extent that an in-State wine maker is a limited retailer, it may ship its product under strict regulatory conditions, as other off-premise in-State retailers may do.[13] Wine makers are also held to the same statutory requirements for responsible sales that are imposed upon other retailers, and its license is subject to the same penalties. MCL 436.1903(1).

Michigan requires that beverage alcohol pass through the hands of licensees with a substantial in-State physical presence that makes them subject to effective state regulation and enforcement. Michigan licensed retailers are held to strict regulatory requirements, and may have their licenses revoked for serious offenses such as sales to minors. MCL 436.1701; 436.1801(2); 436.1903(1). Pet. App. 60a-69a. Michigan's system ensures that in-State consumers receive alcoholic beverages only through an in-State distribution system consisting of identified licensed parties, located in Michigan and directly accountable to the State.

Michigan does not bar the importation or shipment of alcohol through its distribution system; it channels alcohol through a three-tier licensing system. MCL 436.1203(1). While some wines are expensive, others are very inexpensive--appealing to minors[14] and substance abusers--and are imported both domestically and internationally into Michigan and other

[12] See District Court Opinion, Fn 3, Pet. App. 26a-27a.

[13] See sale and delivery restrictions, MCL 436.1203; Mich. Admin. Code r. 436.1011; 436.1021; 436.1305; 436.1503; 436.1515; 436.1702-436.1735.

[14] "Minors find wine online" and regulating such out-of-state shipments presents unique and troubling issues. http://www.statenews.com/editions/021700/p1_beer.html. (Last visited 6/22/04).

States in large volume.[15] Ordering alcohol through the Internet and by direct shipment occurs privately, away from commercial in-State licensed retailers, making it less likely to be observed by other customers, outlet management, surveillance cameras or enforcement agents. Michigan deals with these problems by strictly regulating importation and delivery.

All Michigan licensees, including wine makers, are subject to anti-tied-house provisions of Michigan law.[16] For example, a licensed wine maker or retailer may not have a direct or indirect financial ownership or leasehold interest in a licensed wholesaler. MCL 436.1109(1); 1603(1)-(4); 1607(1)-(2). See *Traffic Jam & Snug, Inc. v. Mich. Liquor Control Comm'n*, 194 Mich. App. 640, 648; 487 N.W.2d 768 (1992).

Michigan's licensees (e.g., retailers, wholesalers, and wine makers) are subject to rigorous investigation in order to become licensed. This requires, among other things, extensive disclosure of financial documents and a police background check. MCL 436.1217; 436.1529, Mich Admin Code r. 436.1103, 436.1105, 436.1107, 436.1109, 436.1111, 436.1113, 436.1115. Pet. App. 45a-49a. Once licensed, they must comply with a multitude of statutory requirements and Commission rules designed to protect the consuming public.

[15] http://www.wineinstitute.org/communications/statistics/uswinesales.htm (Last visited 6/22/04).

[16] The phrase "tied-houses" was first used in England. It describes a two-tier system consisting of only suppliers and retailers, as where a bar was tied, by ownership links or contractual obligations, to a specific manufacturer. *Bartholomae & Roesing Brewing Malting Co. v. Modzelewski*, 183 Ill. App. 352, 365 (1913). This "tied-house" effect created marketing practices that encouraged corruption and excessive consumption of intoxicating liquors. "Tied-houses" in the U.S. would, for example, offer "free lunch" to promote business and heavily encouraged the consumption of their brand of beer to defray the cost of the give-away meal. Michigan anti tied-house provisions are codified at MCL 436.1109(1)-(4), and MCL 436.1603 through MCL 436.1607, Pet. App. 45a and 55a. See *Actmedia, Inc. v. Stroh*, 830 F. 2d 957, 961 (9th Cir. 1986).

MCL 436.1217, Mich. Admin. Code r. 436.1011. Michigan law requires that retailers maintain adequate liability insurance. MCL 436.1803(1). These stringent requirements protect Michigan consumers from unlawful sales, including sales to minors, by requiring that alcoholic beverages be sold and distributed to consumers only by persons who are responsible and who can be held accountable. By making licensees accountable to and reachable by the State, the statute helps to ensure their compliance with the law, since violations may subject a licensee to fines, suspension or revocation of their licenses, and even criminal prosecution.

Michigan licensed retailers (including licensed wine makers) also bear the burden of ensuring that sales are not made to minors or intoxicated persons; that sales are made only during hours authorized by statute and special permits; that sales are not made in violation of local option laws; that only State-approved products are sold; that spirit sales are made in accordance with State-mandated price controls, and; that appropriate taxes are collected and remitted to the State. MCL 436.1701(1); 436.1801(2); 436.2109; 436.2113; 436.2115; Mich. Admin. Code r. 436.1043.

Mandatory reporting requirements for in-State licensees also assist the State in regulating licensed retailers. For example, information provided by wholesalers allows the State to ensure that the retailers are paying all taxes due. See Mich. Admin. Code r. 436.1621; 436.1631; 436.1641; 436.1719; 436.1720; 436.1725. Michigan's dram-shop law also places liability on in-State retailers for injuries and deaths resulting from sales to minors or intoxicated individuals. MCL 436.1801. In-State retail licensees are subject to investigation, inspections and searches. See MCL 436.1217, 436.1235; Mich. Admin. Code r. 436.1645, 436.1651, 436.1711, 436.1728, 436.1735.

In summary, the principal reasons for the structural purpose of Michigan's alcohol distribution and licensing system is to ensure an orderly importation and distribution system that helps prevent illegal sales to minors[17] and intoxicated persons and secures the effective collection of Michigan taxes. MCL 436.1203(1)-(8); 436.1701; 436.1801(2). Pet. App. 49a-52a, 60a-66a.

C. U.S. District Court Decision

The Healds filed their lawsuit in the United States District Court for the Eastern District of Michigan alleging civil rights violations under 42 U.S.C. § 1983 and seeking injunctive and declaratory relief. The Healds specifically requested that Michigan's importation laws barring the direct shipment of wine into the State be declared unconstitutional. See MCL 436.1203; 436.1909 and Mich. Admin. Code r. 436.1515; 436.1719(4). Pet. App. 49a-71a. The complaint asserted that Michigan's law, as it relates to the importation of alcohol, facially violated the dormant Commerce Clause since it discriminated between out-of-State and in-State direct shipments of wine.

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[17] A National Academy of Sciences (NAS) study notes the problem of Internet initiated alcohol purchases is so serious that an argument can be made that banning Internet initiated purchase and home delivery sales altogether is warranted in light of the likelihood that these methods will be used by underage purchasers. *Reducing Underage Drinking, A Collective Responsibility,* Richard J. Bonnie. & Mary Ellen O'Connell, (eds) at 174 (2003). The NAS report found that underage alcohol use costs the nation an estimated $53 billion annually, including $19 billion from traffic crashes and $29 billion from violent crime. *Id.* at 1. "Limiting youth access to alcohol has been shown to be effective in reducing and preventing underage drinking and drinking-related problems." *Id.* at 6. "Many Internet sites sponsored by alcohol companies are easy for children to access" and do not require age verification. *Id.* at 142. Surveys have shown that 10% of underage purchasers report obtaining alcohol through the Internet or by home delivery. *Id.* at 174.

The District Court decided the case on Cross-Motions.[18] Michigan's motion for summary judgment was granted and the Healds' motion was denied in an unpublished District Court Opinion. *Heald v. Engler*, 00-CV-71438, Slip. Op. (E.D. Mich. Sept. 28, 2001). Pet. App. 25a-35a. The District Court held that Michigan's importation laws were but one part of a comprehensive regulatory system that was a permissible exercise of State power under the 21st Amendment. It declared that Michigan's law is not "mere economic protectionism" because the State's statutory system is designed "to ensure the collection of taxes from out-of-State wine manufacturers and to reduce the risk of alcohol falling into the hands of minors." Pet. App. 34a-35a. The Healds' motion for reconsideration was denied by the District Court on November 5, 2001. In denying that motion, the District Court reiterated that the 21st Amendment authorizes States to regulate the flow of alcohol within their borders and that the three-tier system is a proper exercise of that authority, despite the fact that such a system places a minor burden on interstate commerce. Pet. App. 38a-39a.

[18] Michigan submitted evidence with its motion showing the difficulty of effective enforcement over out-of-state shippers, including preventing out-of-state direct shipments of alcohol to minors, collecting taxes from such sales and obtaining jurisdiction. The evidence included but was not limited to: affidavits averring to prosecutions for illegal out-of-state direct shipments to minors; surveys showing the problem with underage drinking at state colleges and the widespread use of the Internet for ordering alcohol. Additionally, studies were submitted by the *Amicus* Michigan Interfaith Council on Alcohol Problems and the *Amicus* State Universities demonstrating the widespread marketing of alcohol to minors.

D. U.S. Court of Appeals for the Sixth Circuit Decision

The United States Court of Appeals for the Sixth Circuit reversed the District Court and declared MCL 436.1203 (the keystone statute regulating the importation and distribution of *all* alcoholic beverages) unconstitutional on its face, concluding that the challenged statutory system "discriminated" against out-of-State wineries, in violation of the dormant Commerce Clause, and could not be justified as advancing the traditional "core concerns" of the 21st Amendment. *Heald v. Engler,* 342 F.3d 517, 525-528 (6th Cir. 2003). Pet. App. 14a-18a. The Sixth Circuit remanded the case back to the District Court for entry of summary judgment in favor of the Healds. Pet. App. 19a-20a.

On November 4, 2003, the Court of Appeals denied Michigan's Motion for Rehearing En Banc. Pet. App. 21a-22a. On November 21, 2003 the Court of Appeals stayed its mandate pending Michigan's filing of a certiorari petition with this Court. Pet. App. 23a-24a. Certiorari was granted on May 24, 2004.

SUMMARY OF THE ARGUMENT

The explicit terms of Sec. 2 of the 21st Amendment --"The transportation or importation into any State . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited" – unambiguously grant to States broad power to regulate the transportation and importation of alcoholic beverages. Michigan's highly regulated alcohol distribution system was enacted in furtherance of its 21st Amendment powers, and its decision to permit licensed in-State wineries to ship directly to consumers while prohibiting unlicensed out-of-State wineries from doing so is authorized by the express terms of Sec. 2 of the 21st Amendment.

Beginning immediately after adoption of the 21st Amendment this Court has consistently reiterated the principle of virtually unfettered State control over the transportation or importation of intoxicating liquor for delivery or use within the State. *Ziffrin Inc. v. Reeves,* 308 U.S. 132, 138 (1939); *State Bd. of Equalization v. Young's Mkt. Co.,* 299 U.S. 59 (1936) The 21st Amendment did not repeal the Commerce Clause or any other provision of the Constitution, but the text, history, and purpose of the 21st Amendment demonstrate that it carves out an extremely broad area of State authority. This Court has uniformly held that the 21st Amendment gives States "'virtually complete control' over the importation and sale of liquor and the structure of the liquor distribution system." *North Dakota v. United States,* 495 U.S. 423, 431 (1990)

Michigan's regulatory system is also expressly permitted by Congress. The Webb-Kenyon Act, 27 U.S.C. § 122 (1935), provides "The shipment or transportation . . . of any . . . vinous . . . intoxicating liquor . . . into any State . . . to be . . . sold . . . in violation of any law of such State . . . is prohibited." Michigan prominently argued this point below, but the Court of Appeals did not even mention it in its decision.

The Court of Appeals' decision ignored the express mandate of both the 21st Amendment and the Webb-Kenyon Act, 27 U.S.C. § 122. It would permit out-of-State suppliers of alcoholic beverages to do precisely what the Constitution and Congress forbid – import and transport alcoholic beverages into a State in violation of the laws of that State.

ARGUMENT

I. Sec. 2 of the 21st Amendment gives Michigan the right to structure its beverage alcohol importation and distribution system.

A. Regulation of alcohol prior to the adoption of the 21st Amendment.

From colonial times until 1919, when the 18th Amendment ushered in Prohibition, alcohol beverages were sold primarily in a two-tier system consisting of only suppliers and retailers. This "tied-house" effect created marketing practices that encouraged corruption and excessive consumption of intoxicating liquors. *Nat'l Distributing Co. v. United States Treasury Dep't,* 626 F.2d 997, 1008-1010 (D.C. 1980).

In the Nineteenth Century when some States attempted to prohibit importation of out-of-State shipments of liquor, this Court held that such bans violated the dormant Commerce Clause. The Second Circuit in *Swedenburg v. Kelly,* 358 F.3d 223, 231-232 (2nd Cir. 2004) traced this history, as follows:

> Prior to the Eighteenth Amendment and nationwide prohibition of alcohol, many States attempted to ban the production and consumption of alcohol, but found their efforts thwarted by Supreme Court decisions invoking the doctrine now known as the dormant Commerce Clause. See, *e.g.*, *Bowman v. Chicago & N.W. Ry. Co.,* 125 U.S. 465, 481, 493-94; 31 L. Ed. 700; 8 S. Ct. 689 (1888) (invalidating under the dormant Commerce

Clause a State law restricting the importation of liquor to those possessing a permit); *Leisy v. Hardin*, 135 U.S. 100; 34 L. Ed. 128; 10 S. Ct. 681; 12 Ky. L. Rptr. 123; 12 Ky. L. Rptr. 167 (1890) (holding that, even after importation, liquor contained in its original package remained an article of interstate commerce, subject to federal Commerce Clause authority). As a result of the Court's decisions, "dry" States found themselves in the unenviable position of being able to prohibit consumption of domestic liquor but helpless to stop the importation of liquor from outside their borders. See *Bridenbaugh*, 227 F.3d at 852 (recounting pre-Prohibition jurisprudence).

Congress reacted by enacting the Wilson Act, ch. 728, 26 Stat. 313 (1890), which gave States the authority to regulate imported liquor "*to the same extent and in the same manner* as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." *Id.* (emphasis added.) The Wilson Act's language signaled Congress' intent to allow States to regulate imported alcohol in the same manner as domestically produced alcohol.

The Supreme Court, however, narrowly construed the Wilson Act, permitting States to regulate the resale of imported liquor in its original package, but preventing the regulation of direct shipments to in-State consumers by out-of-State distributors. *Rhodes v. Iowa*, 170 U.S. 412, 423-25; 42 L. Ed. 1088; 18 S. Ct. 664 (1898). Congress responded with the Webb-Kenyon Act, ch. 90, 37 Stat. 699 (1913), which prohibited "the shipment or transportation, in any manner or by any means whatsoever, of any . . . liquor of any kind, from one State . . . into any other State . . . which . . . is intended, by any person interested therein, to be received,

possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State . . . ." *Id.* The Act's broad language ensured that dry States had the authority to prevent the importation of alcohol across their borders. By the time the Supreme Court upheld the Webb-Kenyon Act in *Clark Distilling Co. v. Western Maryland Railway Co.*, 242 U.S. 311; 61 L. Ed. 326; 37 S. Ct. 180 (1917), the temperance movement had gained considerable ground throughout the nation. And in 1919, the Eighteenth Amendment set the nation on a course of national prohibition and ended the States' legal struggle to regulate alcohol.

The 18th Amendment was ratified in January of 1920, expressly prohibiting the sale or traffic of beverage alcohol.

B. Section 2 of the 21st Amendment is controlling because its language is plain and unambiguous and its meaning clear.

"America changed course in 1933 and repealed the eighteenth amendment by § 1 of the 21st [Amendment]." *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 852 (7th Cir. 2000), *cert. denied, sub nom., Bridenbaugh v. Carter*, 532 U.S. 1002 (2001). However in § 2 of the 21st Amendment the States were expressly given the power to regulate the transportation and importation of intoxicating liquors for delivery or use in that State:

> The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

In 1936, when first asked to interpret the recently adopted 21st Amendment, this Court remarked, "the language of the

Amendment is clear" and "apt to confer upon the State the power to forbid all importations which do not comply with the conditions which it prescribes." *State Board of Equalization v Young's Market Co.*, 299 U.S. 59, 63-64, 62 (1936).

It is the plain and unambiguous language of Sec. 2 of the 21st Amendment that is controlling in this case. In *United States v. Wright*, 302 U.S. 583 (1938) this Court was presented with the question whether a bill had become a law within the meaning of art. 1, § 7 of the U.S. Constitution. The Court noted that the first principle of constitutional interpretation is to give due regard to the deliberate choice of words and their normal meaning. *Id.* at 589. In analyzing the language of a Clause in the Constitution the Court reasoned that "[t]he phrasing of the concluding clause is entirely free from ambiguity and there is no occasion for construction." *Id.* See also, *United States v. Sprague*, 282 U.S. 716, 731 (1931) ("The Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning; where intention is clear there is no room for construction and no excuse for interpolation or addition"); *Reid v. Covert*, 354 U.S. 1, 8, fn 7 (1957) ("This Court has constantly reiterated that the language of the Constitution where clear and unambiguous must be given its plain evident meaning.") Additionally *Wright* is instructive in that the Court determined that it should not adopt a construction that would frustrate the fundamental purpose of a Constitutional provision. 302 U.S. at 596.

Nothing in the text of the 21st Amendment limits States in how they may choose to set up their regulatory framework to deal with the transportation, importation, and distribution of alcoholic beverages. Thus, as a textual matter, there can be no justification for ignoring the plain and unambiguous command of the 21st Amendment.

C. Legislative History of the 21st Amendment.

In addition to the plain text, the legislative history of the passage of the 21st Amendment demonstrates its meaning. The purpose of § 1 of the 21st Amendment was to end Prohibition by repealing the 18th Amendment. One reason for the failure of prohibition was that *national* regulation had not taken into account *local* conditions. See, *e.g.*, 76 Cong. Rec. 4146 (1933), statement of Senator Wagner ("The real cause of the failure of the 18th Amendment was that it attempted to impose a single standard of conduct upon all the people of the United States without regard to local sentiment and local habits.").

Section 2 of the 21st Amendment set forth the manner in which the individual States should regulate alcohol. Such a scheme addressed the concern by some States that they would not be able to protect their residents from alcohol crossing the border from other States because they might lack the power to do so (*i.e.*, because of the dormant Commerce Clause.)[19] 76 Cong. Rec. 4141 (1933), statement of Senator Blaine.

Section 2 was equally concerned with the loss of State tax revenue. See, *e.g.*, *Ratification of the Twenty-first Amendment to the Constitution of the United States*, 142 (Everett Somerville Brown ed., 1938) ("It is both foolish and intolerable to go on submitting to a fallacious system under which an illicit, outlaw liquor traffic annually draws hundreds of millions of dollars of profits out of the nation's capital . . . .") (Indiana ratification convention.) See also Senator Blaine's statement that the purpose of § 2 was, "to restore to the States by constitutional amendment absolute control in effect over

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[19] *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 353-357 (1987)(O'Connor, J., dissenting), contains excerpts from Senate debates showing that the intent was to remove Commerce Clause restrictions from any State's alcoholic beverage regulations.

interstate commerce affecting intoxicating liquors which enter the confines of the States," 76 Cong. Rec. 4143 (1933).

Another purpose of the 21st Amendment was to allow States to moderate consumption of alcohol by separating producers from consumers through a mandated distribution structure, typically a three-tier system of manufacturers, wholesalers, and retailers. Before Prohibition, "tied-houses," where alcohol producers controlled retailers, were considered to have contributed to irresponsible sales and increased consumption of alcohol. See, *e.g.*, H.R. Rep. No. 1542, at 12 (1935) (Federal Alcohol Control Act).[20]

Further evidence that the 21st Amendment was meant to confer broad authority on States is found by examining a proposed § 3 of the Amendment that would have given Congress concurrent power to regulate the sale of alcohol for consumption on the premises. That section was voted down by the Senate because it was inconsistent with § 2 and "would take away from every State in the Union the right to determine how it would regulate the liquor traffic within its boundaries," statement of Senator Black, 76 Cong. Rec. 4177 (1933).[21]

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[20] The Court in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), prefaced its analysis of the 21st Amendment by approving a refusal to examine such history as demonstrating "a wise reluctance to wade into the complex currents beneath the congressional proposal of the Amendment and its ratification in the state conventions." *Midcal*, 445 U.S. at 107, fn. 10. The Court also noted that Senator Blaine, the Senate sponsor of the Amendment resolution, had also described its purpose as "to restore to the States . . . absolute control in effect over interstate commerce affecting intoxicating liquors . . ." 76 Cong. Rec. 4143 (1933).

[21] The rejection of proposed § 3 was discussed in *Hostetter v. Idlewild*, 377 U.S. 324, 337 (Black, J., dissenting):

> Proposing to leave even this remnant of federal control over liquor traffic gave rise to the only real controversy over the language of the proposed Amendment. Senator Wagner of New York . . . opposed Section 3 because it would defeat the proposed Amendment's purpose "to restore to the States control of their liquor problem." [76 Cong. Rec]., at 4145. Senator Wagner argued that giving the Federal Government even "apparently limited power" would allow that power to be "extended to boundaries now undreamed of and unsuspected" by those supporting the proposed Amendment. *Id.*, at 4147. It is clear that the opposition to Section 3 and its elimination from the proposed Amendment rested on the fear, often voiced during the Senate debate, n2 that any grant of power to the Federal Government, even a seemingly narrow one, could be used to whittle away the exclusive control over liquor traffic given the States by Section 2. Having heard those fears expressed, Senator Robinson of Arkansas, the Senate Majority Leader, asked for a vote "to strike out section 3." *Id.*, at 4171. It was because of these fears that the Senate then voted to take Section 3 out of the proposed Amendment while retaining Section 2 and its broad grant of power to the States. *Id.*, at 4179. n2 *E. g.*, 76 Cong. Rec. 4143 (1933) (Senator Blaine); 4144-4148 (Senator Wagner); 4177-4178 (Senator Black).

D. This Court's decisions recognize the State's broad 21st Amendment right to regulate the delivery and use of alcohol beverages within the State.

This Court's decisions shortly after adoption of the 21st Amendment broadly recognized that State beverage alcohol importation and distribution laws were "unfettered by the Commerce Clause." *Ziffrin*, 308 U.S. at 138 (upholding against a Commerce Clause challenge, State restrictions on an interstate carrier of alcoholic beverages); *Indianapolis Brewing Co. v. Liquor Control Comm'n*, 305 U.S. 391, 394 (1939)(upholding under the 21st Amendment a Michigan statute that prohibited the importation of beer into Michigan from distributors in States that did not allow unrestricted importation of alcohol products manufactured in Michigan);

State Bd. of Equalization v. Young's Mkt. Co., 299 U.S. 59 (1936).

In *Young's Mkt.*, sellers of imported alcohol refused to apply for an importer's license required by State statute and regulations, claiming that the requirement discriminated against wholesalers of imported beer and that the statute violated the Commerce Clause. This Court held that there was no discrimination against plaintiffs in violation of the Commerce Clause because of the 21st Amendment. The Court explained, 299 U.S. at 62-63:

> The Amendment which 'prohibited' the 'transportation or importation' of intoxicating liquors into any State 'in violation of the laws thereof,' abrogated the right to import free, so far as concerns intoxicating liquors. The words used are apt to confer upon the State the power to forbid all importations, which do not comply with the conditions which it prescribes. The plaintiffs ask us to limit this broad command. They request us to construe the Amendment as saying, in effect: The State may prohibit the importation of intoxicating liquors provided it prohibits the manufacture and sale within its borders; but if it permits such manufacture and sale, it must let imported liquors compete with the domestic on equal terms. To say that, would involve not a construction of the Amendment, but a rewriting of it.

Subsequent decisions of this Court have recognized the continuing vitality of the 21st Amendment and the principle of *Young's Mkt.* that States have very broad powers to regulate alcohol.

The limits of a State's authority to regulate alcohol trafficking under the 21st Amendment were discussed in this

Court's plurality opinion in *North Dakota, supra*, 495 U.S. 423, 426-444 (1990), that involved North Dakota's regulations on labeling and reporting alcohol sold to federal military bases within the State. These regulations were upheld despite a challenge based on the Supremacy Clause, where the purchaser of the alcohol was the federal government, whose military bases are not subject to State regulation.

While noting that the Court had invalidated certain State liquor regulations where the area or transaction fell outside a State's jurisdiction, the plurality opinion, *id.* at 430-431, stated:

> At the same time, however, within the area of its jurisdiction, the State has "virtually complete control" over the importation and sale of liquor and the structure of the liquor distribution system. The Court has made clear that the states have the power to control shipments of liquor during their passage through their territory and to take appropriate steps to prevent the unlawful diversion of liquor into their regulated intrastate markets. [citation omitted]

The plurality opinion, *id.* at 433, then noted:

> Given the special protection afforded to state liquor control policies by the Twenty-first Amendment, they are supported by a strong presumption of validity and should not be set aside lightly. [citation omitted]

A State's core powers under the 21st Amendment include "promoting temperance," "controlling the distribution of liquor," and "raising revenue." *Id.* at 439.

In a concurring opinion Justice Scalia noted, *id.* at 447:

> The Twenty-first Amendment, which prohibits "the transportation or importation into any state . . . for

delivery or use therein of intoxicating liquors, in violation of the laws thereof," is binding on the Federal Government like everyone else, and empowers North Dakota to require that all liquor sold for use in the state be purchased from a licensed instate wholesaler. Nothing in our Twenty-first Amendment case law forecloses that conclusion. In all but one of the cases in which we have invalidated state restrictions on liquor transactions between the Federal Government and its business partners, the liquor was found not to be for "delivery or use" in the state because its destination was an exclusive federal enclave.

This Court has consistently held that where, as here, a State's law implicates a "core power" under the 21st Amendment, it is immune from challenge and that the primary 21st Amendment "core power" is State control over the importation, sale and distribution process. *North Dakota, supra; Capital Cities Cable, Inc.*, 467 U.S. at 712. The Court of Appeals' invalidation of Michigan's importation, sale and distribution process, conflicts with these decisions because it eviscerates Michigan's most basic "core power" secured by the 21st Amendment, that of structuring its alcohol importation and distribution system.

The Sixth Circuit erroneously dismissed this Court's discussion of the 21st Amendment in *North Dakota* as irrelevant because the case involved the Supremacy Clause. *Heald*, 342 F.3d at 523-524. Pet. App 8a-13a. But this Court's recognition of a State's 21st Amendment powers in *North Dakota* was necessary to its decision. As Justice Scalia wrote, "The Twenty-first Amendment . . . empowers North Dakota to require that all liquor sold for use in the State be purchased from a licensed in-state wholesaler." *North Dakota*, 495 U.S. at 447. In recognizing State powers under the 21st Amendment this Court did not blind itself to Commerce Clause restrictions. (See Justice Brennan's partial dissent, joined by Justices

Marshall, Blackmun and Kennedy where the Commerce Clause is prominently discussed. *Id.* at 449-451.) In fact, the Court indicated that the regulations did not discriminate against the United States because, like any other retailer, it could buy from in-State licensed wholesalers. 495 U.S. at 430-432, 437-439. This presupposes that all other retailers were required to do so. If the State can require all retailers to buy from in-State licensed entities to further "legitimate interests in promoting temperance and controlling the distribution of liquor, in addition to raising revenue," then, a State can also constitutionally require all consumers to buy from in-State licensed entities to further such purposes. *Id.* at 439.

More recently, this Court recognized a State's power to control importation of alcoholic beverages in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), where it noted that Section 2 of the 21st Amendment delegated to the States the power "to prohibit commerce in" alcoholic beverages and further said that State "regulatory power over this segment of commerce is therefore largely 'unfettered by the Commerce Clause.'" *Id.* at 514-515 (citing *Ziffrin, supra*).

E. The Court of Appeals misapplied this Court's decisions.

The Court of Appeals in the present case erroneously concluded that decisions of this Court beginning in the 1960s "signaled a break" from its earlier decisions. Pet. App. 9a. Indeed, the Sixth Circuit found it "disingenuous at best" that Michigan even relied upon the *Young's Mkt.* line of cases. *Ibid.* Instead the Court of Appeals gave insufficient force to the 21st Amendment and undue prominence to the Commerce Clause because of its faulty analysis of *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964), *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984) and *Healy v. Beer Institute*, 491 U.S. 324 (1989). *Heald*, 342 F.3d at 522-526; Pet. App. 9a-13a.

1. In *Hostetter* this Court recognized that under the 21st Amendment a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders.

In *Hostetter*, New York had attempted to close down an airport duty-free shop, whose products were delivered to the ultimate consumer in a foreign country. Under the particular facts of *Hostetter*, the 21st Amendment was irrelevant because the beverages were not being distributed within New York. *Hostetter*, 377 U.S. at 332-333. The Court then said: "To draw a conclusion from this line of decisions that the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause wherever regulation of intoxicating liquors is concerned would, however be an absurd oversimplification" because it would leave Congress without power to regulate interstate or international traffic in alcoholic beverages. *Id.* at 331-332. See also, *Craig v. Boren*, 429 US 190, 206 (1976), *reh'g denied* 429 U.S. 1124 (1977).

Clearly *Hostetter* was not a repudiation of early cases such as *Ziffrin* and *Young's Market*. Indeed, this Court in *Hostetter*, 377 U.S. at 330, cited those cases and recognized that by virtue of the 21st Amendment, the view "has remained unquestioned" that "a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders."

Dep't of Revenue v. James B. Beam Distilling Co., 377 U.S. 341 (1964), was decided the same day as *Hostetter*. It held that the Export-Import Clause prohibited State taxation of alcoholic beverages imported from abroad and warehoused within the

State before further shipment. The 21st Amendment did not permit the State to do what the Export-Import Clause prohibited. The Court, however, stated: "We have no doubt that under the Twenty-first Amendment Kentucky could not only regulate, but could completely prohibit the importation of some intoxicants, or of all intoxicants, destined for distribution, use, or consumption within its borders. There can surely be no doubt, either, of Kentucky's plenary power to regulate and control, by taxation or otherwise, the distribution, use, or consumption of intoxicants within her territory after they have been imported." *Id.* at 346.

Similarly, in *Craig v. Boren*, 429 U.S. 190, 204-205 (1976) *reh'g denied*, 429 U.S. 1124 (1977), this Court held that the Twenty-first Amendment does not save "invidious gender-based discrimination from invalidation as a denial of equal protection of the laws in violation of the Fourteenth Amendment," but cited *Young's Mkt.* and *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401 (1938) for the proposition that the "importation of intoxicants, [is] a regulatory area where the State's authority under the Twenty-first Amendment is transparently clear." *Craig*, 429 U.S. at 207.

2. In *Bacchus* this Court neither transformed 21st Amendment law nor repudiated its prior holdings interpreting the 21st Amendment.

The Sixth Circuit mistakenly viewed *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 274-275 (1984), as transforming 21st Amendment law. *Heald*, 342 F.3d at 523-527. Pet. App. 9a-18a. *Bacchus* involved Hawaii's decision to exempt from taxation two locally produced products: ti root brandy and pineapple wine. *Bacchus*, 468 U.S. at 270-272. The tax exemptions had explicitly been passed and were explicitly defended by the State as exclusively motivated by a desire to aid local industry and had nothing to do with the structure of its

liquor distribution system. *Id.* at pp. 270-276. Hawaii, for the first time cited the 21st Amendment when it submitted its brief to this Court. *Id.* at p. 274, fn. 12. The Court found this "belated" and unelaborated argument unconvincing. *Id.* at 276. Hawaii's eleventh-hour reliance on the 21st Amendment and the fact that the tax was admittedly intended to promote economic protectionism, dissuaded this Court from giving any serious weight to Hawaii's 21st Amendment argument. The Court, *id.* at 276, then stated:

> State laws that constitute *mere* economic protectionism are therefore not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor. [emphasis added]

The dissent in *Bacchus* correctly foresaw that the *Bacchus* decision could undermine State regulatory power. The instant case is an example of how a lower court has purported to follow *Bacchus*, but has actually greatly extended that holding from the particular circumstances that shaped the *Bacchus* decision, to effectively extinguish a State's ability to regulate importation and distribution of alcoholic beverages.[22]

Michigan respectfully submits that *Bacchus* was wrongly decided insofar as the 21st Amendment is concerned. It is inconsistent with the text, history, and purposes of the 21st

[22] Justice Stevens, in a dissent joined by Chief Justice Rehnquist and Justice O'Connor, construed the 21st Amendment and *Young's Mkt.* to permit Hawaii to constitutionally place a tax on out-of-state manufacturers not placed on liquors produced locally. The dissent noted that the *Young's Mkt.* court "explained that the Amendment enables a State to establish a local monopoly and to prevent or discourage competition from imported liquors." *Bacchus*, 468 U.S. at 282. The dissent further observed that *Young's Mkt.'s* reasoning had in no way been limited by the decision in *Hostetter*, at 283-284, and stated that the question is not the appropriate degree of deference to state law nor of the Amendment's core purposes, but whether or not "the provision in this case is an exercise of a power expressly conferred upon the States by the Constitution." *Id.* at 287.

Amendment and fails to give the Amendment its full meaning. In any event, *Bacchus* is not controlling here because of substantial differences from the present case. Unlike the tax scheme at issue in *Bacchus*, the import restrictions in the present case fall squarely within the "transportation or importation" text of the 21st Amendment. Unlike Hawaii's taxation scheme, Michigan's regulatory scheme has ample regulatory purpose and is not "mere economic protectionism."

3. This Court's decision in *Healy* is inapposite since it never examined the relationship of the 21st Amendment to an alleged Commerce Clause violation based on discriminatory treatment of interstate commerce.

The Sixth Circuit also relied on *Healy v. Beer Institute*, 491 U.S. 324, 344 (1989). In *Healy*, this Court invalidated a Connecticut price affirmation statute requiring out-of-State sellers to affirm that the prices charged in Connecticut were no higher than prices contemporaneously charged in nearby States. This Court concluded that the statute's effect was to impair the sellers' ability to competitively price products in bordering States. *Healy*, 491 U.S. at 343. The statute had the effect of controlling commercial activity occurring wholly outside the boundary of the State and thus did not implicate the State's core powers under the 21st Amendment.

Healy began with an analysis of the extra-territorial effects of the statute and then very briefly identified a second violation of the Commerce Clause: the facial discrimination against the brewers and shippers engaged in interstate commerce was not "justified by a valid factor unrelated to economic protectionism." *Id.* at 340-341. The Court found that the statute served to penalize (non-existent) Connecticut brewers from shipping out of State as well. *Id.* Only at this point did the Court turn to the claim "that the Twenty-first Amendment

sanctions Connecticut's affirmation statute regardless of its effect on interstate commerce." *Id.* at 341, *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573 (1986), which invalidated a New York price affirmation statute on the basis that it was an attempt by New York to control the sale of alcoholic beverages in another State, was then cited for the proposition that "the Twenty-first Amendment does not immunize state laws from invalidation under the Commerce Clause when those laws have the practical effect of regulating liquor sales in *other* states." (emphasis added) *Healy*, 491 U.S. at 342. That is: the extra-territorial effect of the statute made the 21st Amendment irrelevant. The Court's opinion in *Healy* never examined the relationship of a violation of the Commerce Clause based on discriminatory treatment of interstate commerce to the 21st Amendment. [23]

[23] A separate opinion, 491 U.S. at 326-327, 341 (Scalia, J., concurring in part and concurring in the judgment) did not state that any difference between the treatment of imports and the treatment of in-state products was unconstitutionally protectionist and unprotected by the 21st Amendment. Connecticut did not treat out-of-state suppliers differently from in-state ones. Connecticut required price affirmations from brewers, whether located in or out-of-state, doing business in both Connecticut and at least one of its neighboring states, and not from brewers, whether located in Connecticut or out-of-state, selling only in Connecticut and not in Rhode Island, Massachusetts or New York. The distinction that Justice Scalia rejected was not between imported and local, but between interstate commerce and intrastate commerce. *Id.* at 344. Importation controls like those at issue in the present case are explicitly protected by the 21st Amendment.

II. The Michigan regulatory framework does not violate the Commerce Clause.

A. While the 21st Amendment does not immunize States from other provisions of the Constitution, it carves out a broad exception for State authority over transportation and importation of alcohol.

The text, history, and purposes of the 21st Amendment demonstrate that it cannot mean the State powers it confers are extinguished by the Commerce Clause. However, that is exactly what the Sixth Circuit has done in applying a *per se* rule of invalidity to State beverage alcohol importation systems that are structured to allow in-State direct shipments but ban out-of-State ones. Such a result is inconsistent with the 21st Amendment's plain and unambiguous language and this Court's jurisprudence.

The Court of Appeals applied strict scrutiny in this facial challenge to Michigan's regulatory framework and struck it down, concluding that there were reasonable nondiscriminatory alternatives. Use of that traditional Commerce Clause analysis failed to afford proper weight to Michigan's powers under the 21st Amendment. The effect of its judgment was not to strike down any favoritism for Michigan licensees but instead to permit unlicensed out-of-State wineries free rein to ship directly to Michigan consumers.

Michigan does not contend that the 21st Amendment immunizes it from other provisions of the Constitution. This Court's decisions clearly indicate that it does not. E.g., *Craig*, *supra* (Oklahoma minimum-drinking age law violated Equal Protection Clause); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971) (Wisconsin statute forbidding alcohol sales to certain persons violated Due Process Clause); *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964)

(Kentucky tax on foreign whiskey violated Export-Import Clause).

It is also clear that a State's 21st Amendment powers are limited by the scope of the text to matters involving the "transportation or importation" of alcohol "for delivery or use" in the State, so there is no extraterritorial reach. E.g., *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 572 (1986), and *Healy v. Beer Institute, Inc.*, 491 U.S. 324 (1989) (invalidating state statutes that had the impermissible effect of regulating alcohol prices in *other* States).

Michigan does, however, contend that the 21st Amendment "created an exception to the normal operation of the Commerce Clause." *Craig*, 429 U.S. at 206. Within those textual limits, Michigan has "virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980) and its three-tier distribution system is "unquestionably legitimate." *North Dakota v. United States*, 495 U.S. 423, 432 (1990). Application of a traditional Commerce Clause balancing analysis, *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), involving strict scrutiny necessarily fails to give effect to the State's constitutional powers in this unique area.

Michigan's regulatory framework clearly serves valid regulatory purposes of "promoting temperance," "controlling the distribution of liquor," and "raising revenue." *North Dakota, supra*, 495 U.S. at 439.

Ignoring the significant regulatory requirements and burdens placed on in-State retailers (including in-State licensed wineries acting as their own retailers), the Court of Appeals only focused on the in-State retailers' ability to deliver a product to Michigan consumers. It found this one factor so

negatively affects the ability of out-of-State wineries to compete that it violates the Commerce Clause. However, the Court missed the point of why the Michigan system is needed and why it works.

The point of Michigan's system is that it addresses Michigan's need to protect its citizens by preventing the sale of alcohol to minors while promoting responsible drinking and to ensure the collection of taxes. For example, requiring that sales and direct shipment to consumers be through an in-State licensed entity assures jurisdiction over claims by persons injured as a result of irresponsible sales. Under Michigan's dram-shop law, MCL 436.1801(3), an in-State retailer who unlawfully sells or provides alcohol to an underage purchaser or visibly intoxicated individual may be held liable for resulting injuries and death. Pet. App. 64a-65a. This State law only applies to in-State licensed retailers. *Tennille v. Action Distrib. Co.*, 225 Mich. App. 66, 70-73; 570 N.W.2d 130, 132-133 (1997); MCL 436.1113(9). Thus, an in-State retailer (and in-State winery) that sells and delivers alcoholic beverages to a Michigan consumer is not only subject to administrative and criminal sanctions, but also may be held accountable to victims of alcohol-related accidents resulting from irresponsible sales. Conversely, Michigan residents injured by alcohol-related accidents resulting from unlawful sales outside the regulatory system would have no assurance that out-of-State sellers may be held accountable for their actions.[24]

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[24] For example, in *Butler v. Beer Across America*, 83 F. Supp. 2d 1261, 1269 (N.D. Ala. 2000), personal jurisdiction was found lacking against a vendor of beer in an action brought by the parents of a fifteen year old who had used his parents' credit card to order beer over the Internet. See *Hockerson-Halberstadt, Inc. v. Costco Wholesale Corp.*, 93 F. Supp. 2d 738, 741, n1 (Dist Ct. La., 2000), "The effect of the Internet and electronic communication on the traditional law of personal jurisdiction poses challenging questions for the courts. . . . This dynamic area will undoubtedly continue to spawn complex legal issues. See Tu Phan, *Cybersell, Inc. v. Cybersell*, Inc., 14 Berkeley Tech. L.J. 267 (1999) (recognizing that Cyberspace knows no national boundaries and allows

Section 203 of the Michigan Liquor Control Code represents a valid exercise of 21st Amendment powers that this Court has repeatedly recognized. Michigan has a substantial interest in regulating alcoholic beverages and by requiring that alcoholic beverages only be sold to consumers by responsible, accountable, and licensed in-State retailers (including in-State winemakers), Michigan provides for an orderly, controlled market which ensures that this dangerous and frequently abused substance is not delivered into the wrong hands and ensures that all such transactions are taxed and uniformly regulated.

B. The U.S. Constitution vests Congress with the power to regulate commerce.

The Commerce Clause grants to Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art I, § 8, cl. 3. "Though phrased as a grant of regulatory power to Congress, the Clause has long been understood to have a 'negative' aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Oregon Waste Sys, Inc. v. Dep't of Envt'l Quality*, 511 U.S. 93, 98 (1994). The Commerce Clause is an extraordinary power that Congress does not exercise lightly. See *Gregory v. Ashcroft,* 501 U.S. 452, 460 (1991).

In the late 1880's and the early 1890's when statewide prohibition laws were enacted this Court seized upon a

users to initiate commercial transactions anywhere)." Also see *Lindgregn v. GDT, LLC*, 312 F. Supp. 2d 1125, 1131-1132 (S. Dist. Ct. Iowa 2004) (Internet sales not enough to establish minimum contacts for personal jurisdiction); 74 U. Colo. L. Rev. 319, 320 (2003) "The law of personal jurisdiction based on Internet activity is murky, and courts are wrestling with how to apply principles of personal jurisdiction to cases that deal with the highly impersonal universe of the World Wide Web."

previously rejected dictum[25] and began applying it as a brake on the operation of such laws with respect to interstate commerce in intoxicants, which the Court denominated "legitimate articles of commerce." While this Court held that a State was entitled to prohibit the manufacture and sale of alcohol within its territory[26] it contemporaneously laid down the rule, in *Bowman v. Chicago & Northwestern Railway Co.,* 125 U.S. 465 (1888) that, so long as Congress remained silent in the matter, a State lacked the power, even as part and parcel of a program of statewide prohibition, to prevent the shipment into it of intoxicants from a sister State.

The Holding in *Bowman* was soon followed by *Leisy v. Hardin,* 135 U.S. 100 (1890), to the effect that, so long as Congress remained silent, a State had no power to prevent the sale in the original package of liquors introduced from another State. The effect of the *Leisy* decision was soon overcome by the Wilson Act, 26 Stat. 313 (1890), repealing its alleged silence, but the *Bowman* decision still stood, the act in question being interpreted by the Court not to subject liquors from sister States to local authority until their arrival in the hands of the person to whom consigned. *Rhodes v. Iowa*, 170 U.S. 412 (1898). Not until 1913 was the effect of the decision in the *Bowman* case fully nullified by the Webb-Kenyon Act, 39 Stat. 699, which placed intoxicants entering a State from another State under the control of the former for all purposes whatsoever.

Congress clearly has the power to exempt alcohol from Commerce Clause restrictions. This Court recognized this

[25] In *Brown v. Maryland*, 25 U.S. 419, 449 (1827), in which the "original package" doctrine originated in the context of state taxing powers exercised on imports from a foreign country, the Court in dictum indicated the same rule would apply to imports from sister States. The Court refused to follow the dictum in *Woodruff v. Parham*, 75 U.S. 123 (1869).

[26] *Mugler v. Kansas*, 123 U.S. 623 (1887);), *Kidd v. Pearson,* 128 U.S. 1 (1888).

principle of law well prior to the *Bowman* decision in stating, "It is Congress, and not the Judicial Department, to which the Constitution has given the power to regulate commerce." *Transportation Co. v. Parkersburg*, 107 U.S. 691, 701 (1883). Thus, "[w]hen Congress so chooses, State actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause." *Northeast Bancorp v. Bd. of Governors of the Federal Reserve System*, 472 U.S. 159, 174 (1985) (interpreting a provision of the Bank Holding Company Act, 12 U.S.C. § 1842(d), permitting regional interstate bank acquisitions expressly approved by the State in which the acquired bank is located, as authorizing State laws that allow only banks within the particular region to acquire an in-State bank, on a reciprocal basis, since what the States could do entirely they can do in part).

The dormant Commerce Clause prohibits State laws that unduly burden interstate commerce, in the absence of express federal authorization. *General Motors Corp. v. Tracy*, 519 U.S. 278, 287 (1997). However, the dormant Commerce Clause is not implicated here because Congress, by federal statute, specifically authorized the type of State law at issue here.

C. Using its Commerce Clause powers Congress enacted the Webb-Kenyon Act, 27 USC § 122, which expressly delegated to the States the right to regulate the transportation and importation of alcoholic beverages within its jurisdiction.

Congress exercised its Commerce Clause power in the Webb-Kenyon Act, 27 U.S.C. § 122, that provides "The shipment or transportation . . . of any . . . vinous . . . intoxicating liquor . . . into any [s]tate . . . to be . . . sold . . . in violation of *any law* of such State . . . is hereby prohibited."

(emphasis added).[27] Thus Congress has unmistakably exercised its power under the Commerce Clause to reinforce and prevent from encroachment those State rights unambiguously provided for in the 21st Amendment.

Any supposed residual dormant effect has been dispelled because Congress has expressly exercised its Commerce Clause power in 27 U.S.C. § 122 (1935). The language "any law" in that statute plainly indicates the States occupy the field. Thus, the enactment of the Webb-Kenyon Act, in which Congress exercised its power to regulate commerce, clearly establishes that the Court of appeals erred when it held that the dormant Commerce Clause was controlling.

Moreover, there can be no doubt over whether the Webb-Kenyon Act would survive a Commerce Clause challenge inasmuch as this Court has already ruled that it does. In *Clark Distilling Co. v. Western Maryland Co.*, 242 U.S. 311, 319 (1917) this Court was confronted with a constitutional challenge of a West Virginia law that provided in pertinent part:

> It shall be unlawful for any person in this state to receive, directly or indirectly, intoxicating liquors from a common, or other carrier. It shall also be unlawful for any person in this state to possess intoxicating liquors, received directly or indirectly from a common, or other carrier in this state. . . .

One question before this Court in *Clark Distilling* was "whether the Webb-Kenyon Law has so regulated interstate commerce as to give the State the power to do what it did in

---

[27] Although the Webb-Kenyon Act was originally enacted in 1913 prior to the Advent of Prohibition it was subsequently reenacted without change on August 27, 1935, c. 740, § 202(b), 49 Stat 877, following the repeal of prohibition and the adoption of the 21st Amendment.

enacting the prohibition law and cause its provisions to be applicable to shipments of intoxicants in interstate commerce," thus saving that law from repugnancy to the Commerce Clause. *Id.* at 321-322 . This Court held that the Webb-Kenyon Act was constitutional and it "took the protection of interstate commerce away from all receipt and possession of liquor prohibited by state law." *Id* at 325.

Additionally, in *Craig v. Boren, supra*, 429 US at 205-206 this court said: "[*Leisy v. Hardin*, *supra*,135 U.S. 100] led Congress, acting pursuant to its powers under the Commerce Clause, to reinvigorate the State's regulatory role through the passage of the Wilson [27 U.S.C. § 121] and Webb-Kenyon Acts. . . . The wording of § 2 of the Twenty-first Amendment closely follows the Webb-Kenyon and Wilson Acts, expressing the framers' clear intention of constitutionalizing the Commerce Clause framework established under those statutes. This Court's decisions since have confirmed that the Amendment primarily created an exception to the normal operation of the Commerce Clause." (Footnotes omitted.)

The dormant Commerce Clause cannot be used to invalidate § 203 of the Michigan Liquor Control Code because Congress has affirmatively exercised its plenary powers under the Commerce Clause to authorize this, and similar State statutes. In enacting the Webb-Kenyon Act, Congress unequivocally recognized the States' authority to control and confine the distribution of alcoholic beverages to licensed sellers who have themselves been determined to be responsible and accountable.

CONCLUSION

Section 2 of the 21st Amendment, grants Michigan the power to regulate the importation and transportation of intoxicating liquor for delivery or use in Michigan. Congress granted Michigan this same right in the Webb-Kenyon Act.

The decision of the Court of Appeals should be reversed because it has not only abrogated the plain and unambiguous command of Sec. 2 of the 21st Amendment but has frustrated the will of Congress.

The decision of the United States Court of Appeals for the Sixth Circuit should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

JENNIFER M. GRANHOLM, *et al.*,
Petitioners,

v.

ELEANOR HEALD, *et al.*,
Respondents.

MICHIGAN BEER & WINE WHOLESALERS ASSOC.,
Petitioner,

v.

ELEANOR HEALD, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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September 23, 2004

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Whether a State's regulatory scheme that permits in-state wineries directly to ship alcohol to consumers but restricts the ability of out-of-state wineries to do so violates the dormant Commerce Clause in light of Section 2 of the 21st Amendment.

STATEMENT PURSUANT TO RULE 29.6

Respondent Domaine Alfred, Inc. has no parent corporation, and no publicly held company owns 10 percent or more of its stock.

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COUNTERSTATEMENT OF THE CASE

At issue in this case is whether the Twenty-First Amendment displaces the fundamental principle of nondiscrimination in trade across state borders that underlies our national economic union. Michigan and its partisans contend that section 2 of the Twenty-First Amendment grants each State such broad authority over the importation of liquor that a State may favor its own wine industry over wine producers from other States. The Sixth Circuit correctly rejected this claim of license to engage in geographic favoritism, holding that Michigan's discrimination against commerce—based solely upon origin outside the State—violates the dormant Commerce Clause and cannot be saved from unconstitutionality by section 2 of the Twenty-First Amendment.

1. The interstate commerce in which the plaintiffs seek to engage arises from the growth of small family farm wineries across the nation in recent decades. Domestic grape production tripled between 1985 and 2000, and domestic wine production now contributes $45 billion annually to the national economy. WineAmerica, *Wine Facts*.[1] A relatively small number of large wineries dominate the national market, producing large quantities of wine and distributing it nationally through the so-called "three-tier" regulatory system for alcohol distribution that arose after the repeal of Prohibition. Under this system, producers of alcoholic beverages are typically required to sell their products to licensed wholesalers or distributors, who in turn sell to retailers, who in turn sell to consumers. *See* 03-1120 Br. 6; 03-1116 Br. 6; *see also* Staff of the Federal Trade Commission, *Possible Anticompetitive Barriers to E-*

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[1] Available at http://www.americanwineries.org/winedata/winefacts04.htm (last visited Sept. 20, 2004).

Commerce: Wine 5 (July 2003) (hereafter "FTC Report").[2]

An increasing proportion of American wine, however, is being produced by family farm wineries, which are now found in all 50 States and by some estimates number over 3,000—more than twice as many as 30 years ago. *See* WineAmerica, *supra*. These small, start-up concerns are often the engines of innovation in the wine industry, and have become a dynamic source of employment and productivity in many of the nation's rural areas. There has been an accompanying explosion in wine-related tourism—even in States not previously known for their wine production. *See id.*

Because many of these farm wineries produce relatively small amounts of wine, direct sales to consumers are not merely an efficient commercial vehicle, but a necessary channel for doing business. Small wineries are, as a practical matter, foreclosed from participating in the traditional three-tier distribution system because their small volumes render their products economically unattractive to wholesale distributors. The problem is compounded because the number of wholesalers that distribute wine has decreased from several thousand in the 1950s to a few hundred today, making it increasingly difficult for small wineries to find wholesalers willing to carry their products. *See* FTC Report at 6.

2. The majority of States have responded to the consumer demand for access to wines from small wineries by permitting direct shipment of wine to consumers across state lines. Twenty-six States now permit some form of direct

[2] The comprehensive FTC Report can be found at www.ftc.gov/os/2003/07/winereport2.pdf (last visited Sept. 14, 2004). It is based on "testimony from all sides of the wine issue, including wineries, wholesalers, state regulators, and a Nobel laureate in economics." FTC Report at 2.

sales and shipments from out-of-state wineries to in-state consumers, and three other States permit limited direct ordering by consumers pursuant to a consumer permit. Some States, like New Hampshire, allow any winery to obtain a state license and make direct shipments to consumers. *See* N.H. Rev. Stat. § 178:27. Some, like Iowa, allow wineries to make direct shipments from States that extend reciprocal shipping privileges to their own wineries. *See* Iowa Code § 123.187 (2003). Some, like Arizona, allow direct shipments only for purchases made in person on site at the winery's tasting room. *See* Ariz. Rev. Stat. § 4-203.04(J) (2003). Many of these States require that out-of-state wineries obtain licenses, report sales and remit taxes on their shipments, and require that shippers obtain an adult signature to prevent wine from being delivered to minors. *See* FTC Report at 8, 26-40. States that allow direct shipping report no problems with underage access or tax evasion due to the direct shipment of wine from out of state. *See* FTC Report at 31, 38.

Reflecting this trend among the States to allow direct shipment of wine to consumers from out-of-state wineries, the National Conference of State Legislatures adopted a Model Direct Shipping Bill in 1997. The model legislation restricts the sale of wine to those persons at least 21 years of age; requires all beverages to be labeled for adult receipt only; requires all out-of-state shippers to pay appropriate taxes and keep detailed sales records; requires out-of-state shippers to obtain licenses; and requires them to submit to the importing state's regulatory authority for enforcing the act and any related statutes or regulations. *See* http://www.wineinstitute.org/MODEL%20DIRECT%20SHIPMENT%20BILL.htm (last visited Sept. 20, 2004). The model legislation addresses state concerns so effectively that, as recently as 2003, Virginia, North Carolina, and South Carolina each abandoned discriminatory regimes and enacted the model direct-shipping legislation. *See* N.C. St. § 18B-

1001.1 (2004); S.C. Code Ann. § 61-4-747 (2003); Va. Code § 4.1-112.1 (2003).

This trend among the States is facilitated by enforcement mechanisms provided by federal law. No winery may operate in any State without a federally mandated "basic permit." 27 U.S.C. § 203 (2004). The United States Tax and Trade Bureau (previously known as the BATF) may revoke the winery's federal permit if it violates the laws of any state. *Id.* § 204. And the federal Twenty-First Amendment Enforcement Act gives state Attorneys General authority to use the federal courts to sue out-of-state wineries to compel compliance with state laws. 27 U.S.C. § 122a(b) (2004).

3. Michigan has eschewed this national trend and has adopted instead discriminatory wine shipment laws that allow only in-state wineries, but not out-of-state wineries, to make direct shipments to Michigan consumers. There is no dispute that Michigan treats out-of-state wineries differently from in-state wineries. *See* 03-1116 Br. 7-9. Out-of-state wineries may not sell wine at retail and are ineligible for any license that would allow them to ship directly to Michigan consumers. *See* Mich. Comp. L. § 436.1607(1).[3] The only license available to out-of-state wineries is an "outstate seller of wine" license. Mich. Admin. Code R. 436.1705(2)(d). This license costs $300, *see* Mich. Comp. L. § 436.1525(1)(d), and enables out-of-state wineries to sell only to Michigan wholesale distributors under the traditional three-tier system, *see* Mich. Comp. L. § 436.1109(9); Mich. Admin. Code R. 436.1719(5). These two intermediate layers of transaction ensure that out-of-state wineries may sell their product to Michigan consumers only at a substantially higher

[3] Contrary to the wholesalers' assertion that Michigan requires only a "substantial in-state physical presence" in order to direct ship, *e.g.*, 03-1120 Br. 3, 13, 35, Michigan actually does not allow an out-of-state winery to direct ship unless the winery actually becomes an in-state winery (*i.e.*, plants grapes in Michigan), *see* C.A. App. 101-02 (Stewart Interrog. 13).

price, or lower profit, than in-state products sold directly to consumers. C.A. App. 239-40 (Bridenbaugh Aff. ¶¶ 15-16); *see also* FTC Report at 22. If it cannot find a wholesaler, an out-of-state winery is foreclosed from the market altogether.

In contrast, an in-state winery may obtain a "wine maker" license that allows it to sell its own wines at retail without going through a wholesaler, Mich. Comp. L. § 436.1113(9); Mich. Comp. L. § 436.1537(2)-(3), and to ship its wine directly to consumers. Mich. Admin. Code R. 436.1011(7)(b). For a small wine maker, this license costs only $25—one-twelfth the cost to an out-of-state winery. Mich. Comp. L. § 436.1525(1)(e). The license entitles the in-state winery to receive orders from Michigan consumers via phone, Internet, or mail, and to fill those orders by shipping directly to the home of the consumer who places the order.

4. Plaintiff Domaine Alfred is one of those out-of-state wineries that is excluded from the Michigan market. It is a small winery in San Luis Obispo, California, owned and operated by Terry Speizer. Mr. Speizer produces a mere 3000 cases of wine a year.[4] Because of this limited production and small customer base, he cannot obtain a wholesaler to distribute his wine in Michigan. Even if he could find a wholesaler willing to list his wine, he could not afford to sell it through the three-tier system. Because both the wholesaler and retailer would mark up the price, Mr. Speizer would have to discount the price to the wholesaler in anticipation of those mark-ups, which would mean an unsustainable loss of revenue. He has received requests for wine from Michigan customers, but cannot fill them because of the direct shipment prohibition. C.A. App. 85 (Domaine Alfred Aff. ¶¶ 11-15).

[4] Domaine Alfred would meet Michigan's definition of a small winery, which is a winery producing less than 50,000 gallons (20,000 cases) per year. Mich. Comp. L. § 436.1111(9).

Joining Mr. Speizer as plaintiffs are 13 Michigan wine consumers and journalists who, although stymied by Michigan's discriminatory laws, seek to purchase out-of-state wine by direct shipment. Eleanor and Ray Heald are professional wine critics, consultants and educators, who write wine reviews for major national publications. Their occupation requires that they obtain advance samples of wine sent directly to them from out-of-state wineries so that they can critique, preview and write about them. Because of the direct shipment prohibition, they have been unable to obtain those samples, have lost income, and have been hamstrung in their ability to inform the public about new wines from out of state. C.A. App. 43-48 (Heald Aff. ¶¶ 4-7, 16-17).

5. The plaintiffs filed this action against various Michigan state officials, contending that the Michigan direct shipment law discriminated against interstate commerce in violation of the dormant Commerce Clause. The state defendants argued that the Michigan regulatory scheme constituted a valid exercise of the State's power under section 2 of the Twenty-First Amendment. The Michigan Beer & Wine Wholesalers Association (hereafter "the wholesalers"), a lobbying organization for the Michigan liquor-distribution industry, intervened in support of the discriminatory regime in which out-of-state wineries must sell only to the wholesalers that comprise its membership. In a brief unpublished opinion, the district court granted summary judgment to the defendants, upholding Michigan's law based on the view that section 2 of the Twenty-First Amendment "authorizes the states to control alcohol in ways that it [sic] cannot control cheese." 03-1116 Pet. App. 33a; 03-1120 Pet. App. 33a (internal quotation omitted).

6. The Sixth Circuit (Daughtrey, J., joined by Guy and Boggs, JJ.) reversed. *See* 03-1116 Pet. App. 1-18a; 03-1120 Pet. App. 1a-17a. The court of appeals began by recognizing that, in a series of decisions immediately after ratification of the Twenty-First Amendment, the Supreme Court had

"afforded the states nearly limitless power to regulate alcohol under the new amendment." 03-1116 Pet. App. 8a; 03-1120 Pet. App. 8a. The court reasoned, however, that Michigan's reliance on those cases was "disingenuous at best because, as early as the 1960s, the Supreme Court signaled a break with this line of reasoning." 03-1116 Pet. App. 9a; 03-1120 Pet. App. 8a. Under this Court's subsequent cases, the court continued, challenges to state alcohol laws should be assessed by "determining how closely related the law in question is to the 'core concerns' of the Twenty-first Amendment." 03-1116 Pet. App. 10a; 03-1120 Pet. App. 9a.

After reviewing this Court's more recent cases, the Sixth Circuit concluded that facially discriminatory laws regulating commerce in alcohol remain subject to strict scrutiny under the dormant Commerce Clause, and that the State must prove that no reasonable nondiscriminatory alternatives are available to advance the State's compelling purposes. *See* 03-1116 Pet. App. 11a; 03-1120 Pet. App. 11a. The court "reject[ed] the implication that a state's 'virtually complete control' over liquor regulation enables it to discriminate against out-of-state interests in favor of in-state interests." 03-1116 Pet. App. 12a; 03-1120 Pet. App. 11a. According to the court, such an approach was "simply forbid[den]" by this Court's decision in *Bacchus Imports, Ltd., v. Dias,* 468 U.S. 263 (1984), which struck down a discriminatory tax exemption favoring certain locally produced alcoholic beverages at the expense of out-of-state liquor imports. 03-1116 Pet. App. 12a; 03-1120 Pet. App. 11a.

Applying this framework to the Michigan statute, the Sixth Circuit concluded that "it is clear that the Michigan statutory and regulatory scheme treats out-of-state and in-state wineries differently, with the effect of benefiting the in-state wineries and burdening those from out of state." 03-1116 Pet. App. 14a; 03-1120 Pet. App. 13a. The court noted that, under the Michigan system, in-state wineries would enjoy both greater access to consumers and greater profits by virtue

of their exemption from the three-tier system to which out-of-state wineries were subject. *See* 03-1116 Pet. App. 14a; 03-1120 Pet. App. 13a. Noting that "the relevant inquiry is not whether Michigan's three-tier system *as a whole* promotes the goals of temperance, ensuring an orderly market, and raising revenue, but whether the discriminatory scheme challenged in this case ... does so," the Sixth Circuit concluded that Michigan had not proved that it was necessary to discriminate against out-of-state wineries in order to further any of the "core concerns" of the Twenty-First Amendment and declared the law unconstitutional. *See* 03-1116 Pet. App. 15a; 03-1120 Pet. App. 14a.

7. Both Michigan and the wholesalers petitioned for rehearing by the panel and rehearing *en banc*. The Sixth Circuit denied both petitions without dissent. *See* 03-1116 Pet. App. 21a-22a; 03-1120 Pet. App. 21a-22a. Both Michigan and the wholesalers timely filed petitions for writ of certiorari on February 2, 2004. This Court consolidated the two petitions and a petition to review the Second Circuit's decision in *Swedenburg v. Kelly*, 358 F.3d 223 (2d Cir. 2004), granting certiorari on May 14, 2004 on a single question presented: "Does a State's regulatory scheme that permits in-state wineries directly to ship alcohol to consumers but restricts the ability of out-of-state wineries to do so violate the dormant Commerce Clause in light of Sec. 2 of the 21st Amendment?"

7. In addition to this case and *Swedenburg*, four other Courts of Appeals have recently addressed the constitutionality of state laws prohibiting the direct shipment of wine. In each, the court agreed with the Sixth Circuit that discriminatory shipment laws violate the dormant Commerce Clause despite the Twenty-First Amendment. *See Dickerson v. Bailey*, 336 F.3d 388, 403 (5th Cir. 2003); *Beskind v. Easley*, 325 F.3d 506, 516-17 (4th Cir. 2003); *Bainbridge v. Turner*, 311 F.3d 1104, 1112-13 (11th Cir. 2002); *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 853 (7th Cir. 2000). The two Courts of Appeals that upheld such bans did so only because they found no discrimination. *See Swedenburg*, 358 F.3d at 239 ("New York's regulatory scheme allows [all] licensed wineries ... direct access ... in a non-discriminatory manner"); *Bridenbaugh*, 227 F. 3d at 853 (statute does not discriminate because "Indiana insists that *every* drop of liquor pass through its three-tiered system and be subjected to taxation").

SUMMARY OF ARGUMENT

The court of appeals' decision invalidating Michigan's discriminatory regime was clearly correct. Its holding that discriminatory wine shipment rules violate the Commerce Clause and are not saved by the Twenty-First Amendment comports with every other Court of Appeals decision to have addressed the question. The two decisions upholding state laws, upon which petitioners rely, held nothing more than that the state regimes at issue did not, in fact, discriminate against interstate commerce.

Under settled dormant Commerce Clause jurisprudence, a State's explicit discrimination against out-of-state articles of commerce faces "a virtually *per se* rule of invalidity." *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). Michigan draws just such an impermissibly invidious line at the state border. The winery "outside the gates" is forbidden to engage in precisely the same commercial activity permitted "within the city walls." That distinction, based solely on geography, is utterly inimical to the idea of national economic union. It is forbidden by the Commerce Clause.

Nor is Michigan's discriminatory apparatus saved by section 2 of the Twenty-First Amendment. This Court's cases make clear that States enjoy greater authority over liquor than they do over, say, milk. Yet this Court has also consistently invalidated state liquor regulations (no less than state milk regulations) that discriminate against out-of-state commerce. Michigan may regulate wine sales, and it may

regulate intensively, even to the point of prohibition. But it may not discriminate. This Court's cases have long made clear that "the greater power to forbid imports does not imply a lesser power to allow imports on discriminatory terms." *Bridenbaugh*, 227 F.3d at 853 (Easterbrook, J.) (summarizing cases). As this Court said in rejecting a Twenty-First Amendment defense of a discriminatory state tax on alcoholic beverage imports, "[d]oubts about the scope of the Amendment's authorization notwithstanding, one thing is certain: The central purpose of the provision was not to empower States to favor local liquor industries by erecting barriers to competition." *Bacchus Imports*, 468 U.S. at 276.

For the same reasons, the Webb-Kenyon Act, 27 U.S.C. § 122, first enacted in 1913 and re-enacted in 1935 after the repeal of Prohibition, provides no affirmative authority from Congress for state discrimination against out-of-state wine shipments. That Act merely mirrors the language of section two of the Twenty-First Amendment, and no more authorizes discrimination against out-of-state wine shipments than does the Amendment itself. Indeed, this Court already has construed the Act narrowly, as only prohibiting shipments into dry areas; it thus cannot be read as authorizing States to discriminate against out-of-state sellers in favor of local interests. *See, e.g., Seaboard Air Line Ry. v. North Carolina*, 245 U.S. 298, 303 (1917).

Under the appropriately exacting scrutiny these constitutional principles require, Michigan's discriminatory wine shipment laws must fall. Even granting the strength of the State's interests in preventing access by minors, regulating the distribution of wine, and collecting taxes, those interests can readily be served by nondiscriminatory alternatives, such as the evenhanded direct shipment bills already enacted by a growing majority of Michigan's sister States.

ARGUMENT

I. MICHIGAN'S DISCRIMINATION AGAINST OUT-OF-STATE WINE PRODUCERS VIOLATES THE DORMANT COMMERCE CLAUSE.

It is undisputed that Michigan's wine shipment law discriminates explicitly against out-of-state commerce. Michigan provides that in-state wineries may sell and ship their wine directly to consumers, but out-of-state wineries may not. No matter how law-abiding the Virginia, California, Arizona (or other out-of-state) winery may be, and no matter how spotless its record of scrupulous compliance with State and federal law, Michigan says no. That winery simply may not sell its products directly to consumers, but rather must sell its products only through state-licensed wholesalers (who have, not surprisingly, intervened in this litigation and attempted to defend this discriminatory system). But while saying no to out-of-state wineries, Michigan says a hearty yes to the approximately 40 wineries now dotting the Michigan landscape.

There can be no doubt that this amounts to textbook discrimination within the meaning of the dormant commerce clause, namely "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994). Because such discrimination against an out-of-state product violates the core principle of our national economic union, it faces a "virtually *per se* rule of invalidity," *Philadelphia*, 437 U.S. at 624. This is so even though wine rather than garbage or milk is the product at issue.

A. The Principle of Nondiscrimination Against Interstate Commerce Lies at the Core of the National Economic Union.

Since Justice Johnson's concurring opinion in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), this Court has been steadfast in protecting a fundamental proposition of national economic union: The Commerce Clause, by its own force, prohibits state-imposed discrimination against interstate commerce. *See id.* at 231 ("If there was any one object riding over every other in the adoption of the Constitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints."). All Justices now sitting on this Court have embraced this proposition. *See, e.g., S. Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160, 169 (1999) (Breyer, J., for a unanimous Court); *Assoc. Indus. of Mo. v. Lohman*, 511 U.S. 641, 646 (1994) (Thomas, J., for a unanimous Court). Eight of the now-sitting Justices have authored opinions for the Court embracing it.[5] An entire body of decades-old law has grown up explicating and applying the principle. The principle is simple and easy of application: States are not to discriminate against interstate commerce. To do so is presumptively wrong and

[5] *See, e.g., D.H. Holmes Co. v. McNamara*, 486 U.S. 24, 29-30 (1988) (Rehnquist, C.J.); *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 192-93 (1994) (Stevens, J.); *New Energy Co. v. Limbach*, 486 U.S. 269, 273-74 (1988) (Scalia, J.); *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 393 (1994) (Kennedy, J.); *Fulton Corp. v. Faulkner*, 516 U.S. 325, 330-31 (1996) (Souter, J.); *Assoc. Indus. of Mo. v. Lohman*, 511 U.S. 641, 646 (1994) (Thomas, J.); *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298, 311 (1994) (Ginsburg, J.); *S. Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160, 169 (1999) (Breyer, J.). *See also C & A Carbone*, 511 U.S. at 402 (O'Connor, J. concurring in the judgment) ("Where ... a regulation 'affirmatively' or 'clearly' discriminates against interstate commerce on its face or in practical effect, it violates the Constitution unless the discrimination is demonstrably justified by a valid factor unrelated to protectionism.").

unconstitutional.[6]

The nondiscrimination principle abundantly found in this Court's jurisprudence is firmly grounded in the structure of our national economic union. In no small part, the Founding itself—expressly aimed to form a more perfect union—was animated by the need to quash parochial jealousies embodied in trade barriers betraying the Framers' vision of a vast commercial market. "The Framers granted Congress plenary authority over interstate commerce in 'the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.'" *Oregon Waste Sys.*, 511 U.S. at 98 (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 325-36 (1979)). As Justice Jackson observed on behalf of the Court:

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

[6] Although several Justices have critiqued aspects of the Court's dormant Commerce Clause jurisprudence with respect to balancing even-handed state regulations against the burden they place on interstate commerce, *see e.g., Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 609-20 (1997) (Thomas, J., dissenting); *West Lynn Creamery*, 512 U.S. at 210-12 (Scalia, J., concurring in the judgment), none have suggested abandoning the nondiscrimination principle.

H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 539 (1949).

It was "[t]he 'negative' aspect of the Commerce Clause"—the presumptive prohibition of discriminatory and partial legislation—that James Madison and the Founders recognized to be "the more important" towards the creation of a national market. *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 193 n.9 (1994).[7] "[T]he peoples of the several states must sink or swim" together, as Justice Cardozo taught in a passage often quoted by this Court. *Baldwin v. G.A.F. Seelig*, 294 U.S. 511, 523 (1935). Therefore, "[i]f a restriction on commerce is discriminatory, it is virtually *per se* invalid." *Oregon Waste Sys.*, 511 U.S. at 99.

The cases are legion. For example, New York dairy farmers have been instructed that our national economic union requires competition with more efficient Vermont dairies, even when the putative justification for discrimination is public health. *See Baldwin*, 294 U.S. at 523. Oklahoma wildlife officials have learned that they may not conserve the local minnow population by closing their rivers to fishermen who would sell their catch out of the State. *See Hughes*, 441 U.S. at 337. And, North Carolina apple growers have been told that they may not avoid competition with Washington growers through a state law prohibiting those growers from advertising their higher out-of-state standards, even when the law purportedly is necessary to prevent consumer confusion. *See Hunt v. Wash.*

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[7] As Madison explained, the Commerce Clause "grew out of the abuse of the power by the importing States in taxing the non-importing, and was intended as a negative and preventive provision against injustice among the States themselves, rather than as a power to be used for the positive purposes of the General Government." 3 M. Farrand, *Records of the Federal Convention of 1787*, at 478 (1911). *See also Federalist* No. 22, at 143-45 (A. Hamilton) (Clinton Rossiter ed., 1961); James Madison, *Vices of the Political System of the United States*, in 2 *Writings of James Madison* 362-63 (G. Hunt ed., 1901).

State Apple Adver. Comm'n, 432 U.S. 333, 351 (1977).

This nondiscrimination principle enjoys such force in the Court's jurisprudence that New Jersey was told that it must accept Philadelphia's garbage, *Philadelphia*, 437 U.S. 617, Alabama was told that it must accept hazardous wastes from around the country, *Chemical Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334 (1992), Oregon was told it must not impose a surcharge on out-of-state garbage, *Oregon Waste Sys.*, 511 U.S. 93, and Clarkstown, New York was told it could not require all garbage to be processed through its home-grown plant rather than processed out of state, *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383 (1994). From these cases, it cannot reasonably be questioned that Michigan must treat in-state and out-of-state commerce the same.

B. The Nondiscrimination Principle Applies in Full Force to the Sale of Alcohol.

This Court has made clear that the same nondiscrimination principle applies with force to the sale of alcoholic products. In *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 273, 275-76 (1984), the Court held that the Commerce Clause prohibited Hawaii from exempting the makers of local pineapple wine and a local brandy from a tax applied generally to all liquor imported from out of the State. The Court reiterated that "[o]ne of the fundamental purposes" of the Commerce Clause "was to insure against discriminating State legislation." *Id.* at 271 (internal quotation omitted). This Court reaffirmed that "[i]t has long been the law that States may not 'build up [their] domestic commerce by means of unequal and oppressive burdens upon the industry and business of other States." *Id.* at 272 (quoting *Guy v. Baltimore*, 100 U.S. 434, 443 (1880)). Whatever the motives of the state legislature, the tax discriminated against out-of-state producers in favor of local producers, and the tax therefore violated a "cardinal rule of Commerce Clause jurisprudence." *Id.* at 268. The Constitution simply does not

tolerate any efforts by the State to discriminate between the products of in-state and out-of-state sellers, even of alcoholic beverages.

This Court's holding in *Bacchus* confirms that the nondiscrimination principle is deeply rooted in the constitutional fabric of the union, and admits of no exception for alcoholic beverages. "When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests," the Court has "generally struck down the statute without further inquiry." *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986) (applying strict scrutiny to a state regulation that sought to regulate beer prices outside the territory of the State). In *Healy v. Beer Institute, Inc.*, 491 U.S. 324 (1989), for example, the Court applied the nondiscrimination principle to invalidate a statute regulating the importation of beer by requiring out-of-state beer shippers, but not in-state shippers, to affirm that their prices in Connecticut were no higher than in surrounding states. *See id.* at 340-41; *see also id.* at 344 (Scalia, J., concurring in the judgment). The national economic union does not permit Michigan to carve out a market for its local wineries in which they may operate free from competition with those out of state, any more than it entitled Connecticut to protect its own beer shippers against price competition. The court of appeals' decision did nothing more than faithfully apply this well-established rule to invalidate Michigan's discriminatory ban on direct shipping.

C. Michigan's Shipment Law Violates the Nondiscrimination Principle.

Michigan's wine shipment rule discriminates against out-of-state wineries in several respects. In contrast to in-state wineries, an out-of-state winery must find a wholesaler willing to distribute its wine or else be totally excluded from

the market. *See* FTC Report at 23-25; C.A. App. 88-90 (Siegl Aff. ¶ 2). And because out-of-state wineries may only sell their wine through a separate wholesaler and retailer, both of which mark up the price, their wine is relatively more expensive to consumers. C.A. App. 239-40 (Bridenbaugh Aff. ¶¶ 15-16). State laws that raise the price of out-of-state goods in relation to in-state products are "paradigmatic examples" of discrimination against interstate commerce. *West Lynn Creamery*, 512 U.S. at 193. By allowing only in-state wineries to direct ship, Michigan gives its in-state wineries a competitive advantage over out-of-state wineries—a residents-only express lane that enables in-state wineries to bypass the wholesaler's toll booth. In addition, the ban on interstate direct shipment gives in-state businesses a monopoly on serving customers who want home delivery. This is a significant commercial advantage in Michigan, which has many areas (*e.g.*, the Upper Peninsula) that are far from the nearest well-stocked wine store.

Michigan asserts that the State did not enact the wine shipment rule with the intent to engage in economic protectionism, so the rule should not be characterized as impermissibly discriminatory. 03-1116 Br. 29; 03-1120 Br. 31. Similar arguments have been rejected by this Court many times. A "pure motive" is not a defense, and "a court need not inquire into the purpose or motivation behind a law to determine that in fact it impermissibly discriminates against interstate commerce." *Assoc. Indus. of Mo. v. Lohman*, 511 U.S. 641, 653-54 (1994); *see also Oregon Waste Sys.*, 511 U.S. at 100 ("the purpose of, or justification for, a law has no bearing on whether it is facially discriminatory").

II. THE TWENTY-FIRST AMENDMENT DOES NOT IMMUNIZE MICHIGAN'S DISCRIMINATION AGAINST OUT-OF-STATE WINE PRODUCERS.

Faced with a statute that blatantly discriminates against

out-of-state wineries in violation of the Commerce Clause, Michigan and the in-state wholesalers who benefit from its protectionism summon forth the Twenty-First Amendment, asserting that a State has utterly unrestricted authority when it "exercises its core power to regulate the importation of alcohol for use in the State." 03-1120 Br. 30. But the Twenty-First Amendment is not nearly as powerful as Michigan and the wholesalers would have it. Indeed, elsewhere in their briefs, Michigan and its partisans concede, as they must, that the Twenty-First Amendment does not "immunize" Michigan "from other provisions of the Constitution," or from federal legislation under the affirmative authority of the Commerce Clause. *See* 03-1116 Br. 17-18, 31-32; 03-1120 Br. 15, 27-29. It follows inexorably from this concession, and from the text, history and jurisprudence of the Twenty-First Amendment, that the Amendment likewise provides no shield from the Commerce Clause's nondiscrimination principle.

A. The Twenty-First Amendment Does Not Displace Other, Pre-Existing Constitutional Provisions.

If the terms of section 2 were as powerful as Michigan and the wholesalers claim, then the Twenty-First Amendment would save state liquor regulations from violating all other constitutional provisions. Indeed, a State could rely upon section 2 to bar the importation of wine produced by African-American-owned wineries, but allow importation of wine produced by white-owned ones. That cannot be so. Indeed, no one would contend that such a flagrant equal protection violation would somehow be rendered constitutional by virtue of the later-ratified Twenty-First Amendment. Just as the First Amendment's seemingly absolute proscription, "Congress shall make no law ... abridging the freedom of speech," does not preclude reasonable time, place and manner regulations, so too the Twenty-First Amendment

does not provide the all-encompassing power that would be suggested by the literal terms of section 2.

To the contrary, the Twenty-First Amendment is to be understood as a part of the whole Constitution, and a proper understanding of its terms requires an analysis of where that narrowly focused amendment falls in our constitutional structure. As this Court has recognized with respect to the Commerce Clause (and the same could be said for the other provisions of the Constitution as well):

> Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case.

Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 332 (1964). Ordinary rules of constitutional interpretation are not suspended with respect to the Twenty-First Amendment. The judicial task remains to afford the language of section 2 a reasonable construction in harmony with the rest of the founding document.

Accordingly, this Court has consistently rejected States' attempts to use the Twenty-First Amendment to wash away their constitutional sins. For example, the Twenty-First Amendment has been held not to create a zone where free speech principles are suspended. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516 (1996) (invalidating a state regulation of alcohol price advertising). Nor does the Amendment permit violations of the Equal Protection Clause. *See Craig v. Boren*, 429 U.S. 190, 204-09 (1976) (invalidating a state regulation discriminating on the basis of gender in setting the legal age for purchase of beer). Even a state regulation imposing a tax on liquor imported from abroad, a regulation falling squarely within the terms of the Twenty-First Amendment, has been held to fall under the prohibition of the Export-Import Clause. *See Department of*

Revenue v. James B. Beam Distilling Co., 377 U.S. 341, 345-46 (1964). Such cases illustrate that the text of the Twenty-First Amendment is not to be read as erasing all preceding constitutional text. After all, the First Amendment upheld in *44 Liquormart* preceded the Twenty-First Amendment's ratification by 140 years, and the Fourteenth Amendment vindicated in *Craig* by 70 years.

Nor does the Twenty-First Amendment shield state regulation from Congress's affirmative exercise of power under the Commerce Clause. Alcoholic beverage industries are governed by federal legislation enacted under Congress's affirmative Commerce Clause power, such as the Sherman Act, even though that charter of free enterprise is not embedded in a constitutional amendment and long preceded the Twenty-First Amendment. *See Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 711-16 (1984); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106-14 (1980). Indeed, if the Twenty-First Amendment conferred such expansive plenary power on the States as Michigan contends, then a vast array of federal regulations of alcoholic beverages could be trumped by state laws, turning the ordinary operation of the Supremacy Clause on its head. This is not and has never been the law.

B. The Twenty-First Amendment Does Not Displace the Nondiscrimination Principle of the Dormant Commerce Clause.

Michigan and the wholesalers nonetheless contend that even if other constitutional provisions restrict aspects of the state regulation of alcohol, the Commerce Clause does not restrict *in any way* a State's Twenty-First Amendment power to regulate the importation and sale of alcohol. *See* 03-1120 Br. 24 (claiming the power to regulate importation is absolutely unlimited by the Commerce Clause); *see also* 03-1116 Br. 31. This statement proves too much, since there can be no doubt of Congress's *affirmative* authority under the

Commerce Clause to pass the vast array of federal laws that now exist governing interstate commerce in alcohol. *See Hostetter*, 377 U.S. at 332 (rejecting the proposition that the Twenty-First Amendment overrode Congress' Commerce Clause power as "patently bizarre and ... demonstrably incorrect").

Even if understood as limited to the *negative* implications of the Commerce Clause, however, Michigan's statement is belied by the history and jurisprudence of the Twenty-First Amendment as it meets *discriminatory* state liquor legislation. It is common ground that a State enjoys broad power to regulate the importation and sale of liquor within its borders. *See, e.g., California Retail Liquor Dealers Ass'n*, 445 U.S. at 110; *North Dakota v. United States*, 495 U.S. 423, 432 (1990). But this Court has never held that such power is unlimited, even with respect to regulating importation. Both the history of the Amendment's passage and this Court's case law make clear that a State is forbidden from discriminating against interstate commerce in alcohol as much after the Twenty-First Amendment as before it.

1. The Enactment of the Twenty-First Amendment Did Not Undermine The Nondiscrimination Principle.

The Twenty-First Amendment ended Prohibition, and its section 2 granted States authority to regulate and thus burden interstate commerce in a way that would otherwise run afoul of the Commerce Clause. Section 2 entitles a dry State or a State with dry counties, for example, to exclude liquor at its borders in order to reinforce a ban on sale or consumption within the State. But the Twenty-First Amendment does *not* allow States to violate the fundamental principle of national economic union by explicitly discriminating against alcohol producers situated out of state. The touchstone of the authority granted the States over alcohol by the Twenty-First Amendment is evenhandedness toward those in and out of

state. "[T]he greater power to forbid imports does not imply a lesser power to allow imports on discriminatory terms." *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 853 (7th Cir. 2000) (Easterbrook, J.).

The continuity of the nondiscrimination principle is clear from the history of the rise and fall of Prohibition. Before the Civil War, the Court held that States had essentially plenary power to regulate the production and trade of alcoholic beverages within their borders. *See License Cases*, 46 U.S. (5 How.) 504, 577 (1847) (Taney, C.J.). In the late nineteenth century, however, as an increasing number of States became "dry," the Court, applying its then-prevailing view of the dormant Commerce Clause, began to whittle away at that power. Thus, while the Court continued to allow States to prohibit the production and consumption of alcohol within their borders, *see Mugler v. Kansas*, 123 U.S. 623, 661-63 (1887), the Court also held that States could not restrict the importation of liquor to persons possessing a permit, *see Bowman v. Chicago & Northwestern Ry.*, 125 U.S. 465, 499-500 (1888), and then held that States could not regulate the importation or resale of alcohol as long as the alcohol remained in its original package, *see Leisy v. Hardin*, 135 U.S. 100, 108-10 (1890).

The effect of these decisions was that States could regulate alcohol produced by in-state persons, but not alcohol imported into the State from out-of-state persons, rendering state dry laws unenforceable as a practical matter. In order to eliminate this problem, Congress enacted the Wilson Act, which authorized States to regulate imported alcohol "to the same extent and in the same manner" as non-imported alcohol. 26 Stat. 313 (1890). The Wilson Act did not accomplish its purpose, however, because this Court construed the measure narrowly as empowering States to regulate only the *resale* of imported alcohol in its original package, not the direct *shipment* of alcohol to consumers. *See Rhodes v. Iowa*, 170 U.S. 412, 423 (1898); *Vance v. W.A. Vandercook Co.*, 170 U.S. 438, 446 (1898). Again seeking to eliminate the *Bowman/Rhodes* loophole by which out-of-state producers had an advantage over in-state producers and could help in-state parties circumvent state alcohol law, Congress passed the Webb-Kenyon Act, which states, in relevant part, that "[t]he shipment or transportation ... of ... intoxicating liquor of any kind from one State, Territory, or District of the United States into any State, Territory or District of the United States ... to be received, possessed, sold, or in any manner used ... in violation of any law of such State, Territory, or District ... is prohibited." 37 Stat. 699 (1913), now codified at 27 U.S.C. § 122. The Webb-Kenyon Act thus granted States the power to remain "dry" by regulating imported alcohol just as they regulated alcohol produced or sold inside the State.

Prior to Webb-Kenyon, the Court had also held that the Commerce Clause prohibited States from discriminating against out-of-state products. *See Walling v. Michigan*, 116 U.S. 446, 460 (1886). Webb-Kenyon was addressed only to the *Bowman/Rhodes* line of cases, and did not affect the rule against discrimination (although it would have been easy for Congress to do so). Therefore, the statute did not authorize discrimination against alcohol brought into one State from another. *See Pacific Fruit & Produce Co. v Martin*, 16 F. Supp. 34, 39-40 (W. D. Wash. 1936).[8]

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[8] A review of state statutes extant at the time of Webb-Kenyon's passage likewise reveals no origin-based discrimination. Most regulation was aimed at morality by, for example, prohibiting sales to certain enumerated categories of persons, including "drunkards" and "Indians," and prohibiting card-playing and female musicians in saloons. *See e.g.*, N.M. Stat. Ann. § 2926 (1915); S.D. Rev. Code § 2856 *et seq.* (1903). Otherwise, alcohol regulation was largely a matter of local, rather than statewide, control. Although a few States had statewide prohibition, *see e.g.*, N.C. Rev. L. § 2058 (1908); Ann. Code. Ga. § 1770nn (1907), the majority of state regulations involving prohibition allowed localities the option of prohibiting alcohol. *See e.g.*, Mass. Rev. L. ch. 100 §§ 13, 48 (1902); S.D. Rev. Code § 2856 (1903); Gen. Code Ohio §§ 6097, 6108 *et*

In 1919, the Eighteenth Amendment was ratified, and the "Noble Experiment" began. *See, e.g.*, William E. Leuchtenburg, *The Perils of Prosperity 1914-1932*, at 212-17 (2d ed. 1993). That experiment came to an end 14 years later with the Twenty-First Amendment's ratification. Section 1 repealed the Eighteenth Amendment, and thereby ended nationwide Prohibition. For its part, the lesser-known section 2 "closely follows the Webb-Kenyon and Wilson Acts, expressing the framers' clear intention of constitutionalizing the Commerce Clause framework established under those statutes." *Craig v. Boren*, 429 U.S. 190, 205-06 (1976); *see also* 76 Cong. Rec. 4172 (1933) (section 2 effectively "incorporate[d] [the Webb-Kenyon Act] permanently in the Constitution") (statement of Sen. Borah). Section 2, whose language tracks that of the Webb-Kenyon Act almost exactly, was designed to put to rest any lingering doubts about the Webb-Kenyon Act's own constitutionality. *See* 76 Cong. Rec. 4170 (1933) (statement of Sen. Borah).

Despite Michigan and its wholesalers' efforts to portray isolated statements in the debates as evidencing States' absolute power over all alcohol importation, *see* 03-1116 Br. 19-20; 03-1120 Br. 21-23, nothing in the legislative or ratification history of the Twenty-First Amendment or the Webb-Kenyon Act in fact indicates that section 2 was intended to allow States *to discriminate* in favor of in-state

seq. (1910); N.M. Stat. Ann. § 2927 (1915); Ann. Consol. Laws of N.Y. §§ 13, 23 (1917); Mo. Stat. Ann. § 3027 *et seq.*; Pierce's Wash. Code § 5713 (1905). Few States, including those with statewide prohibition, had any regulations regarding the shipment of alcohol, but those that did prohibited shipping to localities that opted to be dry. Those laws did not distinguish between in-state and out-of-state shippers. *See e.g.*, Ky. Stat. §§ 2554, 2557a, 2569a (Carroll 1915); Ann. Consol. Laws of N.Y. §§ 13, 23 (1917).

producers.[9] To the contrary, the entire history of legislative efforts in this area is one of ensuring *evenhanded* regulation of in-state and out-of-state producers in order to effectuate local prohibition and to eliminate the rather odd discrimination against in-state producers that had prevailed as a result of this Court's earlier interpretation of the dormant Commerce Clause.

In a series of short opinions in the period following ratification of the Twenty-First Amendment, this Court suggested that the power of States to regulate under section 2 was quite generous. *See, e.g., State Bd. of Equalization v. Young's Mkt. Co.*, 299 U.S. 59, 62-64 (1936); *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401, 403-04 (1938); *Indianapolis Brewing Co. v. Liquor Control Comm'n*, 305 U.S. 391, 394 (1939); *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138-39 (1939). But despite some broad statements to the effect that a State's power under section 2 is "unfettered by the Commerce Clause," *Ziffrin*, 308 U.S. at 138, even those early cases do not support Michigan and the wholesalers' assertion that section 2 trumps the nondiscrimination principle. *See* 03-1116 Br. 21-22; 03-1120 Br. 24-27.

In *Young's Market*—the case on which all of this Court's other early cases rest and upon which Michigan and the wholesalers rely so heavily—this Court considered a constitutional challenge by wholesalers to California's post-

[9] The core concern of the legislative drafters of section 2 of the Twenty-First Amendment was "to assure the so-called dry States against the importation of intoxicating liquor into those States." 76 Cong. Rec. 4141 (1933) (statement of Sen. Blaine); *see also id.* at 4518 ("Section 2 attempts to protect dry States.") (statement of Rep. Robinson). The core concern of the state ratifying conventions was temperance, and the only state convention delegate to make a recorded comment on shipment repeated what the drafters had said: "All those who traffic in liquor across state lines *which have dry laws* may and will be prosecuted." *Ratification of the Twenty-First Amendment to the Constitution of the United States* 104 (Everett S. Brown ed., 1938) (reprinted 1970) (statement of Mr. Wilson).

Prohibition regulatory scheme, under which wholesalers were required to pay $50 for a wholesaler's license in order to distribute beer, and importers were required to pay an additional $500 in order to import beer into the State. 299 U.S. at 60-61. At the very beginning of its analysis, the Court squarely rejected the contention that this scheme was discriminatory and thereby violated the dormant Commerce Clause. *See id.* at 61-62. The Court reasoned that, while the scheme may have imposed a burden on interstate commerce, "there is no discrimination against [plaintiffs] qua wholesalers," since wholesalers paid the same fee to sell either imported or domestic beer. *Id.* at 61. The Court therefore concluded that "the case does not present a question of discrimination prohibited by the commerce clause." *Id.* at 62. Insofar as subsequent cases (and the wholesalers) characterized *Young's Market* as affirmatively holding that "discrimination against imported liquor is permissible," *e.g.*, *Mahoney*, 304 U.S. at 403, that characterization does not comport with the decision's express understanding of the state regulation in question as nondiscriminatory.[10]

To the extent language in the Court's early Twenty-First Amendment cases suggested that state power under section 2 was effectively unlimited, *see, e.g.*, *Mahoney*, 304 U.S. at 403-04 (rejecting Equal Protection challenge to state liquor regulation), this Court has long since distanced itself from such a sweeping view. The Court has expressly stated that section 2 does not give States unfettered power to regulate

[10] The wholesalers incorrectly assert that *Young's Market* affirmed a discriminatory law that "imposed a $500 license fee for wholesalers to import beer [but] imposed no analogous fee for locally produced beer." 03-1120 Br. 25. The Court noted that California did in fact impose an analogous fee of $750 for the privilege of producing beer locally. 299 U.S. at 64. They similarly mischaracterize *Indianapolis Brewing Co.* as affirming a discriminatory statute, 03-1120 Br. 26, but again the law at issue was actually characterized by the Court as nondiscriminatory in nature. 305 U.S. at 392, 394.

interstate commerce in liquor. *See, e.g.*, *Bacchus*, 468 U.S. at 275. Thus, in *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964) (invalidating a State's effort to terminate duty-free sales of alcohol to departing international airline travelers), the Court conceded that "in the early years following adoption of the Twenty-first Amendment," it had suggested that a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders," *id.* at 330, but promptly added that "[t]o draw a conclusion from this line of decisions that the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause wherever regulation of intoxicating liquors is concerned would ... be an absurd oversimplification." *Id.* at 331-32.

2. This Court Has Applied The Nondiscrimination Principle To Strike Down State Regulations Of Alcohol Importation.

The Twenty-First Amendment no more operates to repeal the negative implications of the Commerce Clause than it does to eliminate Congress's affirmative authority to regulate interstate alcohol shipments. In three key cases, this Court has decisively rejected any claim that the Twenty-First Amendment immunizes from strict dormant Commerce Clause scrutiny those state liquor laws that discriminate against or directly regulate interstate commerce. *See Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984); *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573 (1986); *and Healy v. Beer Inst., Inc.*, 491 U.S. 324 (1989). In each case, the Court applied the nondiscrimination principle to strike down state regulations that fell squarely within the plain language of the Twenty-First Amendment by covering the importation of alcohol.

Bacchus stands in the way of Michigan's vision. As noted

above, *Bacchus* considered the validity of a Hawaii statute that provided a tax exemption for certain locally produced alcoholic beverages. After concluding that this discriminatory exemption violated a "cardinal rule of Commerce Clause jurisprudence," 468 U.S. at 268, the Court then considered whether the provision could be "saved" by the Twenty-First Amendment, *see id.* at 274-76. The Court acknowledged *Young's Market* and other early cases, but it refused to extend the "broad language" in those cases and noted instead that "[i]t is by now clear that the Amendment did not entirely remove state regulation of alcoholic beverages from the ambit of the Commerce Clause." *Id.* at 275. The Court determined that "[t]he question in this case is thus whether the principles underlying the Twenty-first Amendment are sufficiently implicated by the exemption ... to outweigh the Commerce Clause principles that would otherwise be offended." *Id.*

Applying that approach, the Court concluded that the Twenty-First Amendment would not save the discriminatory state law. *See id.* at 276. The Court reasoned that it was "certain" that "[t]he central purpose of the [Twenty-First Amendment] was not to empower States to favor local liquor industries by erecting barriers to competition." *Id.* It was "also beyond doubt that the Commerce Clause itself further strong federal interests in preventing economic Balkanization." *Id.* Therefore, the Court refused to afford the "same deference" to "[s]tate laws that constitute mere economic protectionism" that it would to those "enacted to combat the perceived evils of an unrestricted traffic in liquor." *Id.* Hawaii simply could not rely upon the Twenty-First Amendment to justify an otherwise discriminatory law. *See id.*

To be sure, not everyone on the Court at the time agreed with *Bacchus*. But since Justice White's opinion for a clear majority of the Court was handed down, every Justice in dissent in *Bacchus* has since relied upon that case for the

nondiscrimination principle. Not a single opinion by any Justice has called *Bacchus* into question. As Justice Scalia explained, *Bacchus* stands for the established proposition that a state statute's "discriminatory character eliminates the immunity afforded by the Twenty-first Amendment." *Healy*, 491 U.S. at 344 (Scalia, J., concurring) (*citing Bacchus*, 468 U.S. at 275-76). In short, the baseline since *Bacchus* is nondiscrimination.

Michigan and its wholesaler allies struggle to distinguish *Bacchus*, arguing that the Hawaiian tax regulation did not involve a regulation of "the transportation or importation into any State" of alcoholic beverages covered by the language of section 2. *See* 03-1116 Br. 29; 03-1120 Br. 30-31. Accordingly, the wholesalers argue, *Bacchus* "did not even hint that rational distinctions ... drawn in the course of regulating physical importation may be subject to heightened scrutiny." 03-1120 Br. at 31. To the contrary, however, the Hawaiian regime expressly imposed a tax on all liquors *imported into Hawaii for use therein* that it did not impose on locally produced liquors. A tax on liquor imports is obviously a regulation of the "importation" of liquor into the State. *See Bacchus*, 468 U.S. at 282 (Stevens, J., dissenting).

Nor can the wholesalers find succor in Judge Easterbrook's assertion that "'[n]o decision of the Supreme Court holds or implies that laws limited to the importation of liquor are problematic under the dormant commerce clause.'" 03-1120 Br. 31 (quoting *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 853 (7th Cir. 2000)). The Twenty-First Amendment certainly confers authority on the State to burden commerce in liquor in a way that it may not burden commerce in other products, *e.g.*, by imposing a licensing fee on imports, *compare Young's Market*, 299 U.S. 59 (1936) (upholding licensing fee), *with Bowman v. Chicago & Northwestern Ry.*, 125 U.S. 465 (1888) (striking down permit requirement). But as Judge Easterbrook recognized in the very next sentence (which the wholesalers ignore): "[w]hat

the Court *has* held, however, is that the greater power to forbid imports does not imply a lesser power to allow imports on discriminatory terms." *Bridenbaugh*, 227 F.3d at 853 (*citing Brown-Forman*, 476 U.S. at 579). "Cases such as *Brown-Forman* and *Bacchus* ... treat § 2 as eliminating economic discrimination against in-state commerce of the sort caused by *Leisy*, *Bowman*, and the original package doctrine, *without authorizing discrimination* against out-of-state sellers." *Id.* (emphasis added); *see also Beskind v. Easley*, 325 F.3d 506, 515 (4th Cir. 2003) (Neimeyer, J., joined by Luttig and Traxler, JJ.) ("Because North Carolina's ABC laws discriminate against out-of-state wine manufacturers and shippers in favor of in-state wine manufacturers and shippers, the scheme violates 'a central tenet of the Commerce Clause.'") (quoting *Bacchus*, 468 U.S. at 276).

Michigan therefore cannot rely on section 2's guarantee of authority to regulate the importation and distribution of liquor. *See, e.g.*, 03-1116 Br. 14. Even if section 2 gives the State broad power "over the importation and sale of liquor and the structure of the liquor distribution system," *North Dakota v. United States*, 495 U.S. 423, 431 (1990) (plurality opinion), this does not support the quite different proposition that section 2 trumps the nondiscrimination principle, *see Bacchus*, 468 U.S. at 275-276. And so it is that Michigan seeks to overrule *Bacchus*, dismissing it as "wrongly decided insofar as the 21st Amendment is concerned," 03-1116 Br. 28, or that the wholesalers are forced to admit that *Bacchus* is "arguably inconsistent" with their painstaking interpretation of this Court's Twenty-First Amendment jurisprudence, 03-1120 Br. 30.

Bacchus is not so easily dismissed. To the contrary, it is embedded in a series of decisions addressing the interplay between the dormant Commerce Clause and the Twenty-First Amendment. In each, the Court has specifically rejected the idea that section 2 repeals any "central tenet" of the

Commerce Clause. In addition to *Bacchus*, the Court applied similar reasoning in two other cases refusing to "save" state legislation under the Twenty-First Amendment. *See Brown-Forman*, 476 U.S. 573; *Healy*, 491 U.S. 324. In both cases, the Court considered the constitutionality of price-affirmation statutes, which essentially set a maximum price for alcohol sold in the State by requiring producers to affirm that they were selling their products at a price no higher than the lowest price elsewhere in the country. *See Brown-Forman*, 476 U.S. at 576; *Healy*, 491 U.S. at 328.

In *Brown-Forman*, the Court held that a "prospective" price-affirmation statute violated the dormant Commerce Clause because "[f]orcing a merchant to seek regulatory approval in one State before undertaking a transaction in another directly regulates interstate commerce." 476 U.S. at 582. The Court reaffirmed the controlling principle: "When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry." *Id.* at 579. It reiterated that "the Twenty-first Amendment did not entirely remove state regulation of alcohol from the reach of the Commerce Clause," *id.* at 584 (*citing Bacchus*), and reasoned that the statute could not be "saved" because the Twenty-First Amendment gave States no authority to control sales in other States. *See id.* at 584-85.

In *Healy*, the Court held that a "contemporaneous" price-affirmation statute was invalid under the dormant Commerce Clause, not only because the statute impermissibly affected prices in other States but also because the statute discriminated against alcohol producers and shippers engaged in interstate commerce because it did not apply to in-state shippers. 491 U.S. at 335-41. Following *Brown-Forman*, the Court reasoned that the statute could not be "saved" because the Twenty-First Amendment conferred no authority on States to regulate extraterritorially. *See id.* at

341-42. In an opinion concurring in the judgment, Justice Scalia, citing *Bacchus*, concluded that "[the law's] discriminatory character eliminates the immunity afforded by the Twenty-first Amendment." *Id.* at 344.

Michigan and the wholesalers seek to dismiss these cases, as they dismissed *Bacchus*, by arguing that these cases were not "covered by the Twenty-First Amendment." 03-1120 Br. 30; *see also* 03-1116 Br. 30. The wholesalers further suggest that "the discrimination at issue was entirely different from that at issue" here, because the State's pricing law applied only to sellers doing business in Connecticut and another State. They argue that the pricing law did not implicate the Twenty-First Amendment as it had "nothing to do with importation" or even interstate commerce. 03-1120 Br. 29-30 n.15. This is plainly incorrect. In each of these cases, the Court discussed the Twenty-First Amendment at length and flatly rejected it as a defense.

Moreover, in those cases, the statutes at issue clearly *did* concern the importation of liquor into the State. As Michigan recognizes, *see* 03-1116 Br. 30, the Court concluded in *Brown-Forman* and *Healy* that each statute controlled sales in other States, and thus lay outside the scope of the State's authority. But both price-affirmation laws also regulated the price of *imported* beer. Regulation of the price of imported alcohol falls squarely within the express language of the Twenty-First Amendment, and in both *Brown-Forman* and *Healy*, the Court explicitly rejected the argument that these liquor regulations were immunized by the Twenty-First Amendment.

III. CONGRESS HAS NOT AFFIRMATIVELY AUTHORIZED DISCRIMINATORY STATE REGULATION OF LIQUOR IMPORTS THROUGH THE WEBB-KENYON ACT.

Michigan and the wholesalers argue that, even if Michigan's wine shipment law is discriminatory, it does not violate the dormant Commerce Clause because Congress has exercised its affirmative Commerce Clause power in the Webb-Kenyon Act so as to authorize the States to enact discriminatory liquor regulations. *See* 03-1116 Br. 36-38; 03-1120 Br. 16-17. This argument is without merit. While Congress certainly may confer upon the States the power to discriminate against interstate commerce, it has not done so here.

To begin with, the Webb-Kenyon Act does no more than mirror the language of section 2 of the Twenty-First Amendment. Webb-Kenyon was effectively incorporated into the Constitution by the almost identically worded section 2 of the Twenty-First Amendment. *See Craig v. Boren*, 429 U.S. 190, 205-06 (1976); 03-1116 Br. 38 (recognizing same), It thus can no more operate as a delegation of authority to discriminate than can section 2, *see Bainbridge v. Turner*, 311 F.3d 1104, 1110-11 (11th Cir. 2002), and as discussed above, this Court has repeatedly recognized that the Amendment in no way "repealed" the dormant Commerce Clause.

Michigan points to the phrase "any law" (which is also found in section 2), and argues that this must mean that "any" liquor regulation is immune from scrutiny, regardless of whether it discriminates against interstate commerce. But the argument that the statute amounts to an unlimited delegation has no more purchase here than under section 2 of the Twenty-First Amendment. *See* Section II.A., *supra*. This Court has made clear that those words do *not* immunize State liquor regulations from Commerce Clause scrutiny when used in the Twenty-First Amendment. *See Bacchus*, 468 at 275. There is therefore no reason why those same words, which say nothing at all about discrimination, would have more force when encoded in an act of Congress.

Because congressional authorization of state discrimination against interstate commerce runs contrary to the federal interest in a national economic union, Congress's

intent must be clearly and unambiguously expressed. *See Hillside Dairy, Inc. v. Lyons*, 539 U.S. 59, 66 (2003); *New York v. United States*, 505 U.S. 144, 171 (1992); *Wyoming v. Oklahoma*, 502 U.S. 437, 458 (1992).[11] Webb-Kenyon expresses no such clear intent. To the contrary, the text of the Webb-Kenyon Act, like that of the Twenty-First Amendment, says absolutely nothing about discrimination, and thus cannot be construed as authorizing Michigan to discriminate against out-of-state wine.

In any event, this Court has held that the "only purpose [of the Webb-Kenyon Act] was to give effect to state prohibitions." *James Clark Distilling Co. v. Western Md. Ry. Co.*, 242 U.S. 311, 322 (1917); *see also McCormick & Co. v. Brown*, 286 U.S. 131, 142 (1932) (Webb-Kenyon "referred to the prohibitory laws of the States, the enforcement of which it was intended to aid"). Webb-Kenyon gives States power to prohibit shipments only where there is a state law prohibiting possession, sale, or use of liquor. *See Adams Express Co. v. Kentucky*, 238 U.S. 190, 199 (1915); *Brennen v. Southern Express Co.*, 90 S.E. 402 (S.C. 1916) (Webb-Kenyon does not apply unless there is a state law prohibiting receipt, possession, sale, or use of liquor). It does not give States power to prohibit shipments into counties where possession and use of alcohol is legal. *See Seaboard Air Line Ry. v. North Carolina*, 245 U.S. 298, 303 (1917). Congress thus did not surrender control over interstate commerce so as to permit discrimination against alcohol brought into one State from another. *See Pacific Fruit & Produce Co. v. Martin*, 16 F. Supp. 34, 39-40 (W. D. Wash. 1936).

[11] Petitioners' citation to the McCarran-Ferguson Act, which expressly exempts state insurance laws from scrutiny under the dormant Commerce Clause, is unavailing. *See* 03-1116 Br. 36; 03-1120 Br. 17 & n.2. Far from supporting petitioners, McCarran-Ferguson demonstrates that Congress knows how to create an exception to the nondiscrimination principle when it wants to do so.

IV. MICHIGAN'S INTERESTS CAN READILY BE MET BY REASONABLE NONDISCRIMINATORY ALTERNATIVES

This Court's dormant Commerce Clause cases "leave open the possibility that a State may validate a statute that discriminates against interstate commerce by showing that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *New Energy Co. v. Limbach*, 486 U.S. 269, 278 (1988); *see also Hughes v. Oklahoma*, 441 U.S. 332, 336-37 (1979). Under this exception, the "burden is on the state to show that 'the *discrimination* is demonstrably justified,'" *Chemical Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 344 (1992) (emphasis in original; citation omitted), and there must be "some reason, apart from origin" to treat out-of-state articles differently, *Philadelphia v. New Jersey*, 437 U.S. 617, 627 (1978). The "standards for such justification are high," *New Energy Co.*, 486 U.S. at 278, and require "the clearest showing," *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 393 (1994), not surmise and speculation, *see Hughes*, 441 U.S. at 338. This Court has only rarely found that a State has met its burden of proving the need to discriminate against interstate commerce, and then only upon an extensive factual record clearly demonstrating the absence of workable alternatives. *See Maine v. Taylor*, 477 U.S. 131, 140-43 (1986) (upholding exclusion of imported baitfish that could introduce non-native parasites harmful to Maine fish, where experts testified a total ban was the only way to prevent that).

Michigan has not come close to meeting such a stringent test. The State asserts that the discrimination is necessary to keep wine out of the hands of minors, prevent loss of revenue, and protect public health and safety, but as the Sixth Circuit found, has not supported this assertion with any proof. *See* 03-1116 Pet. App. 15a; 03-1120 Pet. App. 14a-

15a.[12] Michigan's unproven fears that its interests will be compromised by direct shipping are refuted by the finding of the Federal Trade Commission that the twenty-six States that permit direct shipping have encountered no such problems. *See* FTC Report at 38-40. The National Conference of State Legislatures' Model Direct Shipping Bill provides the model of a nondiscriminatory alternative—require that shippers obtain a permit, label packages as containing alcohol, remit taxes, maintain detailed sales records, consent to jurisdiction and inspection, and agree to follow all other state regulations to the same extent as in-state wineries.

Michigan repeats the same argument rejected by the Sixth Circuit, that the three-tier system serves its regulatory interests, so all parts of it are justified. *See* 03-1116 Br. 9-11, 32-33. The argument begs the question why allowing out-of-state wineries to direct ship is a problem, but allowing in-state wineries is not. "[T]he relevant inquiry is not whether Michigan's three-tier system *as a whole* promotes the goals of 'temperance, ensuring an orderly market, and raising

[12] Recognizing the paucity of the record, the wholesalers urge the Court to apply a new "rational basis test" for discriminatory liquor regulations, asking only whether "there is any reasonably conceivable state of facts that could provide a rational basis for the regulation." 03-1120 Br. 14, 32-33. This test would contradict established authority making clear that discriminatory state liquor regulations are virtually *per se* invalid. *Brown-Forman*, 476 U.S. at 579; *Bacchus*, 468 U.S. at 268-75. The wholesalers would have this Court apply here the deferential review of laws enacted under Congress's affirmative Commerce Clause power. *See* 03-1120 Br. 32 (citing *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276 (1981)). These laws, however, as national regulations of interstate commerce, do not raise any prospect of discriminating against (unrepresented) out-of-state entities nor do they have any danger of having an extraterritorial impact in other jurisdictions. Therefore, the only question in such cases is whether Congress's determination that an activity affects interstate commerce is rational. *See Hodel*, 452 U.S. at 276. Here, by contrast, there is every danger that politically powerful insiders have been advantaged at the expense of unrepresented outsiders, and hence a need for judicial solicitude far exceeding mere rationality review.

revenue,' but whether the discriminatory scheme challenged in this case—the direct shipment ban for out-of-state wineries—does so." 03-1116 Pet. App. 15a; 03-1120 Pet. App. 14a; *see also Beskind*, 325 F.3d at 517 ("the question is whether *discriminating* in favor of in-state wineries ... serves a Twenty-first Amendment interest.").

A. Discrimination Is Not Necessary To Prevent Underage Access To Wine.

Michigan's main defense of its anti-shipment rule is that it protects minors. Aided by several amici, Michigan argues that underage drinking is a serious problem, that minors have easy access to credit cards and the Internet, that the anonymity of electronic purchasing allows minors to easily lie about their ages, and that these factors might in the future translate into an epidemic of minors receiving wine shipments from out-of-state wineries over the Internet.

The argument fails. There is simply no evidence that minors are currently buying wine from out-of-state wineries by direct shipment or that direct shipment would be a likely strategy for minors seeking to purchase liquor.[13] Indeed, the Federal Trade Commission found no evidence that States that allowed direct shipment of wine were experiencing any greater problems with access by minors than States that did not. *See* FTC Report at 34; *see also* C.A. App. 242 (Bridenbaugh Aff. ¶ 22). The evidence shows to the contrary that minors consume mostly beer and hard liquor, and relatively little wine. *See* FTC Report at 12. Minors rarely buy any kind of alcohol by direct shipments, which take several days to arrive, because their purchases tend to be

[13] In a footnote, Michigan claims to have introduced evidence on this issue, 03-1116 Br. 12, n.18, but they point to nothing in the record. No such evidence exists. *Compare* C.A. App. 92-93 (Stewart Interrog. 2) (testifying that there are no documented cases in which minors received shipments from out-of-state wineries).

spontaneous and designed for immediate consumption. *See id.* at 33 & n.137 (quoting past president of the National Conference of State Liquor Administrators that experience shows "kids want instant gratification"). Since they buy small quantities, minors are much more likely to buy cheaper beer and spirits through offline sources than to pay a hefty 33% to 83% premium to have a bottle of wine shipped. *See id.* at 33-34. They are far more likely to have someone over 21 buy it for them or obtain it from a local retail outlet that does not check IDs. *See id.* at 33; C.A. App. 242 (Bridenbaugh Aff. ¶ 21). Minors also can obtain alcohol easily at parties, from friends and family, and by stealing it. *Reducing Underage Drinking: A Collective Responsibility* 166-68, 175-76 (Richard J. Bonnie & Mary E. O'Connell, eds. 2004).[14]

Michigan and the wholesalers rely heavily on a statement in the *Reducing Underage Drinking* study, published by the National Academy of Sciences, that 10% of minors have obtained alcohol "over the Internet or through home delivery." 03-1116 Br. 11 n.17; 03-1120 Br. 39. Their reliance is misplaced; there actually was no such finding. The source of this statistic is Linda A. Fletcher et al., *Alcohol Home Delivery Services*, 61 J. STUDIES ON ALCOHOL 81, 82 (2000), who reported that 10% of minors had received home deliveries *from local retail stores*, not over the Internet or by direct shipment from out-of-state wineries. Those home deliveries were mostly of keg beer, and there was not a shred of evidence that minors ordered any wine by this method. Petitioners also neglect to point out that this same NAS study did not endorse banning direct shipments to help protect minors, but the nondiscriminatory alternative of licensing and regulation. *See* Bonnie & O'Connell, *supra*, at 6-9, 174-75.

[14] Available at http://www.nap.edu/books/0309089352/html/ (last visited September 20, 2004).

Even if it were likely that some minors would purchase wine over the Internet, this still would not justify Michigan's *discriminatory* law. It is *already* likely that some minors have such access, because Michigan allows 7684 in-state sellers to take orders by mail, telephone and Internet, and to make home deliveries.[15] Michigan retailers even advertise wine on the Internet and tout their ability to direct ship. C.A. App. 243, 245-46 (Bridenbaugh Aff. ¶ 24, Ex. A). It is therefore impossible to credit Michigan's concern that a direct shipment ban is necessary to prevent underage access to wine.

Michigan bans all direct shipping from out of state, including shipments of wine purchased face-to-face at the winery's tasting room where the seller could see the purchaser and check his or her ID. *See, e.g.*, Ariz. Rev. Stat. § 4-203.04(J) (2003) (permitting direct shipping if purchase made in person at out-of-state winery). But out-of-state wineries are every bit as vigilant in verifying the age of their customers as in-state businesses. *See* C.A. App. 69-70 (Stonington Aff. ¶¶ 4-5); *id.* at 72-73 (Eberle Aff. ¶¶ 4-6); *id.* at 75-76 (Cobb Aff. ¶¶ 4-5); *id.* at 84 (Domaine Alfred Aff. ¶¶ 4-6). The risks, after all, are significant: a winery caught selling to minors can lose its state *and* federal licenses. *See* C.A. App. 241 (Bridenbaugh Aff. ¶¶ 19-20).

If Michigan wants to keep wine out of the hands of

[15] Mich. Comp. L. § 436.1537 allows licensed retailers and wine makers to sell beer, wine, and spirits for home consumption; this includes the right to ship or deliver to a residence. *See* Mich. Comp. L. § 436.1111(7); Mich. Admin. Code R. 436.1011(7)(b). There are 7644 licensed Michigan retailers authorized to make home deliveries of wine, beer and spirits. *See* Mich. Liquor Control Comm'n, Annual Financial Report 2003 at 10, available at http://www.michigan.gov/documents/annual_report_2003_final_86520_7.pdf (last visited Sept. 20, 2004). There are also 40 Michigan wineries that are allowed to make direct shipments. *See* http://www.michiganwines.com/Wineries/wineries.html (last visited Sept. 20, 2004).

minors, there is a reasonable non-discriminatory alternative to a total ban on shipments from out-of-state wineries. The FTC found that other States permit direct shipping without problem by adopting "various procedural safeguards and enforcement mechanisms to prevent sales to minors." FTC Report at 34. Michigan can enact the Model Direct Shipping Bill, which requires the shipper to affix on the outside of each package of wine a notice that states, "CONTAINS ALCOHOLIC BEVERAGES; SIGNATURE OF PERSON AGED 21 YEARS OR OLDER REQUIRED FOR DELIVERY," and also requires that the recipient prove his or her age. *E.g.*, N.C. St. § 18B-1001.1 (2004).[16] The fact that Michigan already relies on this alternative for the 7684 in-state sellers allowed to direct ship, *see* Mich. Comp. L. § 436.1203(2); Mich. Admin. Code R. 436.1011(7)(b), undermines its purported concern that direct shipment will increase underage access.

B. Discrimination Is Not Necessary To Prevent Loss Of Tax Revenue.

Michigan asserts in passing that banning direct wine shipments is necessary to "ensure the collection of taxes." 03-1116 Br. 33. The argument is not developed, probably because, unlike many States that use wholesalers to collect taxes on imported wines, *see* FTC Report at 5, Michigan collects taxes directly from out-of-state wineries on all wine shipped to Michigan wholesalers, *see* Mich. Admin. Code R. 436.1725(2). Michigan does not explain why the State would not be able to collect taxes on wine shipped directly to

[16] The permit-and-regulation alternative also advances the State's interest in protecting minors more effectively than a total ban, because legal shipments are more easily monitored than illegal ones. *See* FTC Report at 34; *see also* C.A. App. 238 (Bridenbaugh Aff. ¶ 11); *id.* at 94 (Stewart Interrog. 3) (conceding that illegal shipments to minors are difficult to detect).

consumers instead of wholesalers.

Even if Michigan were to fear greater evasion of tax payments from out-of-state shippers than in-state shippers, it can readily protect its tax revenues as other States do—by issuing permits to direct shippers conditioned on their filing regular reports of sales and remitting appropriate taxes. This is the procedure endorsed by the National Conference of State Legislatures as a nondiscriminatory alternative to a ban on direct shipments. *See, e.g.*, S.C. Code Ann. § 61-4-747(C) (2003). As the FTC Report found, States that condition direct shipment on the payment of taxes have experienced no problem with tax evasion. *See* FTC Report at 4, 38-40; *see also* C.A. App. 242 (Bridenbaugh Aff. ¶ 22).[17] Indeed, New Hampshire has used this alternative for several years, *see* N.H. Rev. Stat. § 178:27, and reports that allowing direct shipping has not caused it to lose any tax revenue. To the contrary, New Hampshire's wine tax revenue increased by $121,000 in 2003, soon after it implemented a permit system. *See* Gary Dennis, *Wine Online*, Manchester Union Leader,
Sept. 14, 2003, at F1 (quoting John Byrne, N.H. Liquor Commissioner).

C. Discrimination is Not Necessary to Maintain an Orderly Market and Protect Public Safety.

Michigan asserts that because unregulated alcoholic beverage sales would pose a danger to public health and safety, it is necessary to ban direct shipping from out-of-state

[17] Some States express the concern that *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), would prevent them from collecting taxes from out-of-state wineries. *See* Amicus Br. of Ohio *et al.* at 25. The fear is misplaced. *Quill* required a nexus between the business and the State, and a permit would satisfy that requirement.

wineries.[18] This is not the first time a State has come before this Court seeking to discriminate against interstate commerce in the name of public safety. States have used this argument to try to exclude other States' harmful waste from their landfills, *see C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383 (1994); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources*, 504 U.S. 353, (1992); *Philadelphia v. New Jersey*, 437 U.S. 617 (1978); keep large trucks off their highways, *see Kassell v. Consolidated Freightways Corp.*, 450 U.S. 662, 667 (1981); *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429 (1978); and exclude unwholesome food products, *see Dean Milk Co. v. Madison*, 340 U.S. 349, 353-54 (1951); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 522-23 (1935). This Court has consistently rejected the argument. The fact that the State may legitimately protect health and safety cannot justify discriminatory regulation, because "if a State *discriminates* against out-of-state interests ... such facial discrimination will be subject to a high level of judicial scrutiny even if it is directed toward a legitimate health and safety goal." *GMC v. Tracy*, 519 U.S. 278, 307 n.15 (1997) (emphasis added). A State may regulate in the interests of public safety, of course, but must do so evenhandedly. If an out-of-state wine shipment deserves to be restricted, so does a similar in-state shipment. *See Fort Gratiot Sanitary Landfill*, 504 U.S. at 367 ("no valid health and safety reason for limiting the amount of waste ... from outside the State, but not the amount ... from inside the State").

It is not enough for petitioners to cite statistics about the

[18] Michigan insists that the Sixth Circuit's decision holds the State powerless to regulate shipping at all. 03-1116 Br. 31-33. But the decision only prohibits them from regulating in a *discriminatory* fashion. Likewise, amici raise a slippery slope argument that the decision will open the door to the direct shipment of beer and spirits. The Sixth Circuit's decision only prohibits Michigan from *discriminating* against out-of-state brewers and distillers.

social costs of alcohol as a justification for the need to heavily regulate. The State's power to regulate alcoholic beverages is not in dispute. Rather, Michigan has the burden of proving the need to *discriminate*. It must show that there is something *more dangerous* about wine from out of state than from within the state. It has not done so, and the Model Direct Shipping Bill sets forth a reasonable nondiscriminatory alternative.

As already noted, Michigan uses this alternative for its in-state wineries. *See* 03-1116 Br. 9-10; Mich. Comp. L. § 436.1203. The State offers no evidence that licensing and regulation would not work equally well for out-of-state wineries. Instead, it suggests that the permit-and-regulation system is inadequate because in-state wineries are "subject to" inspections and searches, and out-of-state wineries are not. 03-1116 Br. 10. This is simply not true. Michigan law provides that a licensee shall make its premises available for inspection, regardless of whether those premises are in-state or out-of-state. *See* Mich. Comp. L. § 436.1217. There is therefore no legal bar to inspecting an out-of-state winery.[19] Moreover, each State regulates its own wineries as Michigan does. *See, e.g.*, Cal. Bus. & Prof. Code § 23356 (2004) (license requirement); Cal. Food & Agric. Code § 41164 (2001) (grape testing and inspection); Cal. Bus. & Prof. Code § 25170 (1997) (labeling restrictions); *id.* § 25236 (content restrictions). Thus, every out-of-state winery already is required to obtain various permits, to maintain its records, and to comply with extensive state (not to mention federal) regulations in order to do business in their home States as well as the twenty-six States that allow direct shipment. *See also* C.A. App. 241 (Bridenbaugh Aff. ¶¶ 19-20). Out-of-

[19] In any event, Michigan's argument is contrived, because the only evidence in the record demonstrates that state officials do not in fact conduct inspections or searches of in-state wineries. *See* C.A. App. 100 (Stewart Interrog. 9).

state wineries are willing to abide by Michigan laws as well. *See, e.g.*, C.A. App. 85 (Domaine Alfred Aff. ¶ 15).

D. Discrimination Is Not Necessary To Assure Enforcement Of The Dram Shop Act.

Michigan asserts that its direct shipment ban is necessary because out-of-state sellers are not subject to suit under its dram shop act, Mich. Comp. L. § 436.1801. The assertion is frivolous. As a threshold matter, Michigan's dram shop act primarily applies to bars selling liquor for immediate consumption. *See Browder v. Int'l Fidelity Ins. Co.*, 321 N.W.2d 668, 673 (Mich. 1982). It would seem to have little application to a delivery that takes place several days after the sale. In any event, even if the dram shop act applies to a retail seller that ships alcohol to a minor, it draws no distinction between in-state sellers and out-of-state sellers. The law on its face applies to any retail licensee, including one with a shipping license.[20] Michigan has long-arm statutes that give its courts jurisdiction over any out-of-state person who commits an act resulting in a tort in Michigan. *See* Mich. Comp. L. §§ 600.705, 600.715. And federal diversity jurisdiction gives injured plaintiffs access to federal court. 28 U.S.C. § 1332 (2004). It is therefore not surprising that petitioners do not cite a single Michigan case in which a victim of an alcohol-related injury had any problem obtaining jurisdiction over an out-of-state alcohol supplier.

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[20] Contrary to Michigan's assertion, *Tennile v. Action Distrib. Co.*, 570 N.W.2d 130 (Mich. Ct. App. 1997), did not hold that the Dram Shop Act "only applies to in-State licensed retailers." 03-1116 Br. 33. The *Tennile* case holds that because the dram shop act places liability upon retailers who deliver alcohol directly to customers, it cannot be used to sue a wholesaler. It contains no discussion of in-state versus out-of-state sellers.

E. The State Will Have No Difficulty Holding Out-Of-State Wineries Accountable.

Most of the nondiscriminatory alternatives discussed above involve licensing out-of-state wineries that want to engage in direct shipping. Petitioners argue that licensing is not a reasonable alternative because the state will not be able to hold out-of-state licensees accountable to the same extent as in-state licensees. This argument appears contrived, because Michigan has already licensed 252 out-of-state businesses as "outstate seller[s] of wine" and allows them to ship to wholesalers. C.A. App. 306-14 (Pride Aff. ¶ 4). Michigan regulates them, tests their wine, restricts their deliveries, requires that they submit regular written reports of sales, and requires them to pay wine taxes on those sales. *See* 03-1116 Br. 9-11. Many of these are exactly the same wineries that would apply for a direct shipment license, and Michigan offers no explanation why it would suddenly lose the ability to hold them accountable merely because some shipments go to individuals instead of wholesalers.

According to the FTC, the twenty-six States that allow direct shipping do not appear to have problems holding out-of-state wineries accountable. *See* FTC Report at 29-31. Background checks can be done electronically. Books, records and financial data can be mailed, faxed, or electronically submitted to Michigan officials. As one court put it, "[i]n this age of ... computer networks, fax machines, and other technological marvels," it is no harder to inspect and regulate out-of-state license holders than in-state ones. *Cooper v. McBeath*, 11 F.3d 547, 554 (5th Cir. 1994). Other investigations can be conducted in exactly the same way Michigan investigates in-state licensees—by sting operations. *See* C.A. App. 99 (Stewart Interrog. 7). State officials could order wine from out-of-state licensees on a random basis or in response to complaints, to verify whether the winery is complying with all state laws regulating

delivery and payment of taxes.

To the extent that Michigan's argument is based on an allegation that it lacks the resources to regulate an increased number of licensed shippers, it is without merit. An inadequate budget might justify limiting the overall number of permits, but cannot justify discrimination by issuing those permits to in-state businesses only. Besides, as this Court has previously pointed out, the State can always raise the additional funds by charging wineries for the reasonable costs of inspections. *See Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354-55 (1951). Michigan already uses this procedure for offsetting the cost of inspecting hospitals, Mich. Comp. L. § 29.2c; rental housing, Mich. Comp. L. § 125.526(12); motor vehicles, Mich. Comp. L. § 257.716(3); and various other items.

Michigan's argument that it lacks the legal ability to enforce its rules against out-of-state wineries therefore is misguided. It can enforce its rules against out-of-state wineries in the same way it enforces against in-state wineries—by requiring out-of-state wineries to obtain a permit as a condition of engaging in direct shipping and then revoking that permit if the wineries break the law. Nor is there any real danger that out-of-state wineries will treat a Michigan permit lightly, *see* 03-1120 Br. 36-37, because the Tax and Trade Bureau may revoke the winery's *federal* permit if that winery violates a State's laws. *See* 27 U.S.C. § 204(e) (2004). Without a federal "basic permit," a winery cannot operate in *any* State. *See* 27 U.S.C. § 203 (2004). The Bureau has assured the States that it will act on their complaints and "take administrative action against a basic permit where a basic permitee ships alcohol beverages products into a State in violation of the laws of that State." BATF Industry Circular 96-3 (1997).

Michigan also can rely upon the Twenty-First Amendment Enforcement Act, which gives the state Attorney General authority to use the federal courts to enforce compliance with

state laws. 27 U.S.C. § 122a(b) (2004). As the National Alcohol Beverage Control Association has observed, the Act "[provides] state governments with an effective tool to use in preventing the illegal interstate flow of alcohol beverages .. into the hands of underage drinkers." FTC Report at 30 & n. 128.

Finally, the wholesalers purport to defend the interests of in-state wineries, arguing that evenhanded direct shipment regulation is unfair because out-of-state wineries can "use direct shipment as a form of regulatory arbitrage," while in-state wineries cannot. 03-1120 Br. at 37. This "unfairness" argument turns the nondiscrimination principle upside down. Even if a State exercises more control over its own wineries, those in-state wineries (along with in-state wholesalers) exert greater political influence in the State than out-of-state wineries. This Court has long recognized that evenhanded regulation of in-state and out-of-state wineries is essential to ensure that local interests are not able to exert their political influence to obtain special favors that are the sure route to "economic Balkanization." *Bacchus*, 468 U.S. at 276; *see also C & A Carbone*, 511 U.S. at 393 ("The Commerce Clause presumes a national market free from local legislation that discriminates in favor of local interests."); *South Carolina State Highway Dep't v. Barnwell Bros.*, 303 U.S. 177, 184 n.2 (1938) ("[W]hen the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state."). This is why the national economic union presupposes here, as elsewhere, that the nondiscrimination principle trumps the assertion of the need for local favor.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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JENNIFER M. GRANHOLM, Governor; et al.,
Petitioners,
and
MICHIGAN BEER AND WINE WHOLESALERS ASSOCIATION,
Respondent,
v.
ELEANOR HEALD, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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INTRODUCTION

The Command of Section 2 of the 21st Amendment is clear and unmistakable: the "transportation or importation" of intoxicating liquors into Michigan "for delivery or use therein," "in violation of the laws thereof, is herby prohibited." Respondents' proposed delivery violates Michigan law and because the challenged restrictions implement Michigan's constitutional authority, they are permissible. Respondents can prevail in their challenge only if the plain language of the 21st Amendment and the similar language in the Webb-Kenyon Act is not given effect.

Respondents seek to avoid the fact that 70 years ago the Constitution was amended to vest the individual States with authority to control the importation and transportation of this one product, free from limitations of the dormant Commerce Clause that apply to other products. Immediately after adoption of the 21st Amendment this Court upheld its clear meaning in *Young's Market*[1] and *Mahoney*.[2] It continues to acknowledge that principle in more recent decisions, e.g., *North Dakota v. United States*, 495 U.S. 423 (1990) (plurality opinion).

Michigan decided that in order to effectively supervise the traffic in alcoholic beverages all such beverages coming into the State for sale or delivery had to pass into the hands of in-State licensees over whom Michigan has effective regulatory control. Michigan's decision to only allow *intra*state shipment at retail to consumers by a limited number of licensed in-State wine makers who manufacture their own products is permissible because Michigan has effective and immediate

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[1] *State Bd. of Equalization v. Young's Mkt. Co.*, 299 U.S. 59 (1936).

[2] *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401 (1938).

control over these in-State licensees. Michigan can easily audit and penalize in-State licensees who do not comply with Michigan's extensive regulatory regime.[3] Such a regulatory regime is rationally related to the legitimate governmental goals of ensuring that alcohol distribution is effectively regulated, that taxes are paid, and that underage drinkers do not have ready access to alcoholic beverages.

Much of Respondents' Counter-Statement of the Case is dedicated to a recitation of the status of the wine production industry, the alleged difficulty and cost in working through the State's three-tier system,[4] and the claimed "trend" among the States to allow out-of-State direct shipment of wine.[5] It also refers to a non-record staff report of the Federal Trade Commission (FTC) of questionable credibility. These statements and the staff report of the FTC are not relevant to a

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[3] There are only forty in-State wine makers in Michigan. Michigan does not require that only Michigan wines can be direct shipped by its licensees; rather, Michigan allows controlled direct shipment by the appropriate licensee of any wine once the product is brought under Michigan's in-State regulatory control.

[4] The only Respondent winery in this case is Domaine Alfred, Inc. It claims that Michigan's three-tier system is too costly and burdensome; however, it admitted that its uses three different wholesalers to distribute its products in other States and that it has never even attempted to enter the Michigan market or inquire about how it can enter that market. C.A. App. 193-194, 473 (Domaine Interrog. Ans. 1, 3-5), D.C. R 81, Ex C. Although the Respondent consumers claim that Michigan should have no problems with tax collection, they took the 5th Amendment when asked if they ever had alcoholic beverages shipped from a seller not licensed to sell alcohol at retail in Michigan and if they paid taxes on those beverages. C.A. App. 372-373 (Ans. to Interrog., 7). Many of the wines they sought were available in Michigan. C.A. App. 315-318 (Wendt Aff'd.). Consumers can also personally transport a case of wine into the State without going through the three-tier system. MCL 436.1203(7)(a).

[5] However, 35 States, including Ohio, Michigan, and New York, are asking this Court to uphold the States' laws regulating and banning the out-of-State importation and direct shipment of alcohol inside its borders.

proper analysis of the issue before this Court. If a State regulation concerns "whether to permit importation or sale of liquor and how to structure the liquor distribution system" – "the central power reserved by § 2 of the 21st Amendment," that is the end of the matter. *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 715 (1984). No requirement exists that the State regulation be narrowly drawn so as to minimize the burden on commerce, maximize profits for out-of-State wineries, or provide the greatest selection of wines to Michigan consumers. Section 2 expressly empowers States to restrict imports of alcoholic beverages in a manner that the dormant Commerce Clause would not permit as to other products.

ARGUMENT

I. When State legislation concerns the "transportation or importation" of intoxicating liquors "for delivery or use" in the State, the 21st Amendment controls.

The 21st Amendment expressly vests control over the commerce in intoxicating liquors to the States:

> The transportation or importation into any State, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited. U.S. Const. Amend. XXI, § 2.[6]

Statutory and constitutional construction rules require giving effect to the ordinary meaning of the language used. *Garcia v. United States*, 469 U.S. 70, 75 (1984). If the plain

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[6] Respondents fail to even quote the 21st Amendment in their 48-page brief. Strikingly, they concede that the "literal terms" of Section 2 suggest "all encompassing power" to the State but then argue that the literal terms don't mean what they say. Resp. Br., 18-19.

language is unambiguous, judicial inquiry ends, except in "'rare and exceptional circumstances.'" *Id.* Indeed, this Court "has constantly reiterated that the language of the Constitution where clear and unambiguous must be given its plain evident meaning." *Solorio v. United States*, 483 U.S. 435, 454 n. 3 (1987) (quoting *Reid v. Covert*, 354 U.S. 1, 8 (1957) (plurality opinion)). *Id.*

Shortly after the 21st Amendment's ratification by the States, this Court was called upon to interpret it in cases challenging "protectionist" State liquor laws.[7] As in the present case, the challengers in those cases argued that the 21st Amendment could not, in view of the dormant Commerce Clause, be used to treat imported liquor differently than in-State liquor. The Court concluded that such a construction would be a "rewriting" of the 21st Amendment. *Young's Market*, 299 U.S. at 62. This Court later declared that *Young's Market* had settled the question that "under the Amendment, discrimination against imported liquor is permissible." *Mahoney*, 304 U.S. at 403. This Court has never overruled the *Young's Market* line of cases with respect to a State's 21st

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[7] *State Bd. of Equalization v. Young's Mkt. Co.*, 299 U.S. 59 (1936) (California's discriminatory $500 license fee for the privilege of importing beer from outside the State was upheld against a Commerce Clause challenge; *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401 (1938)(upholding Minnesota statutory limitation on the types of blended spirits imported into the State, which was not imposed upon those produced in-State); *Indianapolis Brewing Co. v. Liquor Control Comm'n*, 305 U.S. 391 (1939)(upholding a Michigan statute that prohibited the importation of beer into Michigan from distributors in States that did not allow unrestricted importation of alcohol products manufactured in Michigan); *Joseph S. Finch & Co. v. McKittrick*, 305 U.S. 395, 397-398 (1939)(upholding a Missouri ban on the alcohol imports from States that themselves had discriminatory import policies, Justice Brandeis held the alleged discriminatory intent of the Missouri statute to be entirely beside the point); and *Ziffrin, Inc. v. Reeves*, 308 U.S. 132 (1939)(upholding Kentucky Act that imposed rigorous conditions on the transport and delivery of liquor).

Amendment right to control its alcohol importation and distribution system. Instead, this Court has repeatedly reiterated that this is "a regulatory area where the state's authority under the Twenty-first Amendment is transparently clear." *Craig v. Boren*, 429 U.S. 190, 206-207 (1976) *reh'g denied*, 429 U.S. 1124 (1977) (citing *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 330 and n. 9 (1964)).

Respondents' argument that the *Young's Market* line of cases and the decision in *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000), did not involve "discriminatory" State liquor laws (*i.e.*, laws that drew distinctions within the challenged regulatory systems) simply does not square with the facts or holdings in those cases. Each of them involved "discriminatory" State Liquor laws that were upheld under the 21st Amendment. See No. 03-1120, MB&WWA Br., 4, 5, 12, 15-16, 24-27.

More recent decisions of this Court do not put this power of the States in question. Nor do they suggest that the plain language of the 21st Amendment, granting the States the power to control their alcohol importation and transportation system, is problematic. *North Dakota v. United States*, 495 U.S. at 431 (States have "'virtually complete control' over the importation and sale of liquor and the structure of the liquor distribution system.") *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 514-515 (1996) (Section 2 delegated to the States the power "to prohibit commerce in" alcoholic beverages and further said that State "regulatory power over this segment of commerce is therefore largely 'unfettered by the Commerce Clause'" citing *Ziffrin, supra*).

II. Respondents distort the plain language of the Webb-Kenyon Act and incorrectly infer the importation of a "non discrimination" provision from the earlier Wilson Act.

Respondents assert, Resp. Br., 22-25, 32-35, that like the Wilson Act, the Webb-Kenyon Act evidences a Congressional intent that out-of–State shipments of alcoholic beverages may not be treated differently than in-State shipments. That contention is simply wrong, as can be seen from a comparison of the words of the two Acts and the history that resulted in the need for Webb-Kenyon.

The Wilson Act, 27 U.S.C. § 121, was enacted in 1890 and provides, in part:

> All . . . intoxicating liquors . . . transported into any State . . . *shall upon arrival* in such State . . . be subject to the operation and effect of the laws of such State . . . enacted in the exercise of its police powers, *to the same extent and in the same manner as though such* . . . liquors had been produced in such State . . . . (emphasis added)

The Webb-Kenyon Act, 27 U.S.C. § 122, was enacted in 1913[8] and provides, in part:

> The shipment or transportation, in any manner or by any means whatsoever, of any . . . intoxicating liquor of any kind form one State . . . into any other State . . . to be received . . . sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State . . . is hereby prohibited.

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[8] The Webb-Kenyon Act was re-enacted in 1935, after the repeal of Prohibition by the 21st Amendment. The Wilson Act was not re-enacted.

Comparison of the two Acts plainly shows that the Webb-Kenyon Act does not contain the qualifying language set forth in the Wilson Act that imported alcoholic beverages had to be treated in the same "manner as though such liquids or liquors had been produced in such State." Webb-Kenyon actually gave States the right to regulate imported alcoholic beverages in a manner that would not have been permitted under the Wilson Act. A review of the jurisprudence that led to these two statutes confirms that Congressional intent.

Following this Court's decision in *Leisy*,[9] when Congress attempted to free State regulation of alcoholic beverages from the limitations imposed by *Bowman*[10] and *Leisy*, it was initially concerned that States not use their newly liberated power to enact discriminatory legislation. Thus, the Wilson Act, by its explicit terms, did not permit different treatment of alcoholic beverages originating out-of-State since it only removed dormant Commerce Clause protection from shipments of alcoholic beverages upon arrival in the State.

Later in *Scott v. Donald*, 165 U.S. 58 (1897), the Court invalidated South Carolina legislation limiting the permitted mark-up in State dispensaries of in-State wine while not so limiting the mark-up of California wine and prohibiting the direct importation of wine to consumers. The only objection to the challenged legislation was that it violated the dormant Commerce Clause. "We cheerfully concede that the law in question was passed in the bona fide exercise of the police power." *Id.* at 91. The otherwise valid legislation, enacted

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[9] *Leisy v. Hardin*, 135 U.S. 100 (1890)(could not regulate the importation or resale of alcohol as long as the alcohol remained in its original package).

[10] *Bowman v. Chicago & Northwestern Ry.*, 125 U.S. 465 (1888)(could not restrict the importation of liquor to persons possessing a permit).

under the police power, was not saved from dormant Commerce Clause challenge by the Wilson Act because it neither banned the manufacture and sale of intoxicating liquors within the State nor did it apply uniformly to in-State and out-of-State products, as the Wilson Act required. *Id.* at 100.

The next year in *Vance v. Vandercook*, 170 U.S. 438 (1898), the Court was confronted with a challenge to a revised South Carolina dispensary law without the discriminatory mark-up provisions and with a limitation rather than a prohibition of the right to receive out-of-State shipments of alcoholic beverages for use but not for sale. Quoting at length from *Scott*, the Court rejected the claim that the dispensary law was discriminatory. The Wilson Act had been interpreted in *Rhodes v. Iowa*, 170 U.S. 412 (1898) as not applying until shipments were received by the consignee, so the limitation on direct receipt was ruled unconstitutional under the dormant Commerce Clause. *Vance*, 170 U.S. at 451-452.

The Wilson Act still left the States unable to regulate alcoholic beverages effectively, since their policies could be legally frustrated by shipments from out-of-State. In *Dugan v. Bridges*, 16 F. Supp. 694, 704 (D.N.H. 1936) the distinction between the Wilson and Webb-Kenyon Acts is well recognized. There a three-judge court, in rejecting a Commerce Clause and Fourteenth Amendment challenge to a New Hampshire law conditioning importation of alcoholic beverages to in-State wholesalers upon the manufacturer's receipt of a certificate of approval, wrote of the Webb-Kenyon Act:

> This act in its original form contained the same language that was used in the Wilson Act to prevent discrimination against out-of-state products . . . . [citation omitted] In the act as finally passed, the restrictive language does not appear. Its omission seems important. It shows an intent to give the states

> an entirely free hand in regulating the importation and transportation of liquor. *Id.* at 704.
>
> The Court then observed:
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> There appears to be no prohibition in the act against discrimination between liquors produced within the state and those produced outside the state. *Id.*

The Webb-Kenyon Act was passed only after President Taft first vetoed it on constitutional grounds. See 49 Cong. Rec. 4291-4292, 4299, 4447 (1913). President Taft had vetoed the Act, criticizing it for permitting "the states to exercise their old authority, before they became states, [*i.e.* before ratification of the Constitution] to interfere with commerce between them and their neighbors." See 49 Cong. Rec. 4292. The Webb-Kenyon Act was intended to and did permit effective State regulation. It did so in a way that protected from dormant Commerce Clause challenge legislation that might be criticized as 'discriminatory.'[11]

III. Michigan's regulations are necessary for effective alcohol regulation.

A. Effective alcohol regulation requires drawing distinctions.

Respondents object to Michigan's alcoholic beverage regulatory scheme because they claim it makes a "discriminatory" distinction between out-of-State and in-State

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[11] In *Clark Distilling Co. v. Western M. R. Co.*, 242 U.S. 311, 325 (1917) this Court held that the "[Webb-Kenyon] act did not simply forbid the introduction of liquor into a State for a prohibited use, but took the protection of interstate commerce away from all receipt and possession of liquor prohibited by state law."

wineries. However, Michigan rationally decided that effective alcoholic beverage regulation requires this distinction is necessary.[12]

The 21st Amendment and the Webb-Kenyon Act authorize Michigan to channel out-of-State shipments of alcohol to licensed wholesalers in order to achieve regulatory control through a transparent and accountable distribution system. For regulatory control out-of-State shipments are simply not the same as in-State ones.[13] Michigan has rationally determined that it cannot effectively track out-of-State direct shipments to prevent illegal alcohol sales, collect taxes, or take meaningful enforcement action (*i.e.* it cannot effectively close out-of-State businesses that violate its laws). Michigan does not discriminate against out-of-State wines. The Michigan market is open to out-of-State wines and for the most part (like most other States) its wine retail market consists of imported wines.[14] Michigan's regulatory distinctions between out-of-State shipment directly to Michigan residents and in-State

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[12] For example, Michigan's Liquor Code (like every other State) makes many different kinds of distinctions in or between classes of licenses that permit sales and consumption of alcohol. MCL 436.1107(2)-(11). Also see MCL 436.1503(1)(location of alcohol retail licensee must be 500 feet from church or school building); Mich Admin Code r 436.1133 (retail hard liquor business can't be within one half mile of another); MCL 436.1541, Mich Admin Code r 436.1129(3)(a); 436.1135(3)(a) (Restrictions on retailers with gas pumps); Mich Admin Code r 436.1311 (Prohibiting advertising referencing minors); MCL 436.1916 (Restricting Entertainment).

[13] Unlawful discrimination exists only when a State discriminates among similarly situated in-State and out-of-State interests. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 125-126 (1978). See also, *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200, 216 (2nd Cir. 2003).

[14] See http://www.wineinstitute.org/communications/statistics/Sales_03.htm.

shipment to Michigan residents merely reflects the fact that the out-of-State direct shipment operates outside of Michigan's strict regulatory system and the in-State shipment does not.

All states regulate alcoholic beverages more extensively than they do most other products. All states make distinctions among alcoholic beverages when regulating their distribution, sale, or use. The traffic, type of shipment, or use made of one intoxicant may be more harmful to the public peace and health than another. The question whether one intoxicant or its shipment is more harmful, requiring greater restraint, is a question that depends upon a variety of circumstances subject to the exercise of judgment and discretion on the part of each State's Legislature and Liquor Control Commission. In this regard, the 21st Amendment and the Webb-Kenyon Act grant broad authority to the States to regulate the transportation and importation of alcohol. The States' regulatory classifications are not subject to strict scrutiny. This is not to say that the 21st Amendment or the Webb-Kenyon Act empower a State to act with "total irrationality or invidious discrimination" in controlling the distribution and shipment of alcohol. See *Craig*, 429 U.S. at 212-14 (Stewart, J., concurring).[15] Since Michigan's laws regulating the importation, distribution and sale of alcoholic beverages are neither irrational nor invidious, they are constitutionally protected.

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[15] See also, *Mahoney*, 304 U.S. at 403; *Kronheim & Co. v. District of Columbia*, 91 F.3d 193 (D.C. 1996), *cert. den.* 520 U.S. 1186 (1997) (D.C. law that generally forbids alcoholic beverage licensees from storing beverages outside the District upheld as valid under the 21st Amendment); *Felix v. Milliken*, 463 F. Supp. 1360 (E.D. Mich. 1978)(Equal Protection challenge to Michigan's law raising the legal drinking age to 21 upheld); and *Inturri v. Healy*, 426 F. Supp. 543 (D. Conn. 1977)(distinctions in alcohol regulation between dinner theatres, lounges, and cafes are valid).

Although they focus on wine, Respondents' argument boils down to the proposition that under the dormant Commerce Clause, any privilege that Michigan grants to an in-State alcohol beverage licensee must also be granted to an out-of-State entity engaged in the same general profession (e.g., wine maker, retailer, wholesaler, brewpubs). Respondents assert that since Michigan allows in-State wine makers to ship their products directly to Michigan consumers, it must also let out-of-State wine makers ship directly to Michigan residents. Taken to its logical conclusion, that would require that since Michigan allows certain other licensed in-State retailers operating within the three-tier system to directly ship alcoholic beverages to Michigan residents, then any of the hundreds of thousands of out-of-State retailers in alcoholic beverages should also be able to directly ship alcoholic beverages to Michigan residents. This would turn Michigan's and other States' systems upside down. In addition, such a decision could perversely result in the kind of reverse discrimination resembling "that created by *Bowman, Leisy, Rhodes, Vance,* and the original package doctrine a century ago, when States discriminated against in-State sellers, because they could not effectively govern direct shipments from elsewhere." *Bridenbaugh,* 227 F.3d at 854.

The bottom line is that Respondents' goal could lead to a market in alcoholic beverages over which States will have lost effective control. Accordingly, under their theory many States' importation and distribution regulations would be invalid under the Commerce Clause despite the 21st Amendment.[16] For

[16] Respondents and some of the Amici point to Michigan's Out of State Seller of Wine license (OSSW) as evidence of discrimination or economic protectionism. However, they misunderstand how an OSSW license works and inappropriately compare it to a small Michigan wine maker license fee. An OSSW license is more akin to a license to act as an agent for the out-of-State sale of wine through Michigan's three-tier system. Mich. Admin. Code r. 436.1705, C.A. App. 315-317 (Wendt Aff'd.). A small out-of-State winery wishing to sell its wine is not required to pay the $300 license fee. It only needs to find one of many OSSW licensees. *Id.* The $25 in-State wine maker fee does not account for all of the additional regulatory costs and local permit costs associated with operating this highly regulated business in Michigan. MCL 436.1537(3). In addition to other requirements, payment of an additional $100 fee must be paid by the small Michigan wine maker for sales and wine tasting at each off-premise location. To sell other beer and wine products, Michigan wine makers must pay an additional $100 license fee. MCL 436.1525(j).

instance, under Respondents' theory of the law, the reciprocal shipping States they and other *Amici* refer to in their briefs could be struck down under the dormant Commerce Clause since those reciprocal laws discriminate against wineries in States that do not allow direct shipping. See Calif., *et al.,* Amici Br., 1. Even the proposed Model Shipping legislation cited by Respondents would not be impervious to Commerce Clause attack.

B. Federal enforcement laws are no substitute for State regulation and the 21st Amendment Enforcement Act does not evidence Congress's intent not to allow States to regulate out-of-State shipments.

Respondents and other *Amici* suggest that Michigan can rely upon the 21st Amendment Enforcement Act, 27 U.S.C. § 122a(b) (2004), and the power of the United States Tax and Trade Bureau (TTB)[17] to pull federal permits under 27 U.S.C. § 203 (2004), to enforce compliance with its shipment laws. Resp. Br., 46-47, Mem. of Cong. Amici Br., 1, 28-29. This argument is meritless.

[17] The United States Tax and Trade Bureau was formerly known as the Bureau of Alcohol, Tobacco, and Firearms.

First, as New York and the *Amici* States point out[18], the 21st Amendment Enforcement Act provides for injunctive relief only. Second, when Michigan attempts enforcement action against illegal out-of-State shippers, jurisdictional defenses are raised which are difficult if not impossible to overcome. For instance, when Michigan attempted enforcement efforts against out-of-State manufactures and retailers such as the Great American Beer Club, California Wine Club, the Wine Exchange, Best Buy Wine Club, Pop's Wine and Spirits, and Connoisseur Imports they all claimed Michigan lacked jurisdiction and asserted that *Quill Corp. v. North Dakota,* 504 U.S. 298 (1992) prevented the collection of taxes and that the 21st Amendment is no exception.[19] It is no wonder Respondents gloss over *Quill* and suggest that licensing out-of-State shippers would resolve the tax collection problem. Resp. Br., 41, n. 17. However, what constitutional licensing scheme a State chooses to adopt for the out-of-State shipments of alcohol imported into its territory is a legislative choice reserved to the States by the 10th and 21st Amendments.

The suggestion that the TTB will pull an illegal shipper's permit is open to question. TTB, not the State, makes the decision on whether to take action based on whether "there is a continuing, material, adverse impact upon a State through the actions of a basic permittee located outside the boundaries of the affected State" and the "extent of this authority does not extend to situations where an out-of-State retailer is making the shipment into the State of the consumer."[20] "Retailers are not

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18 No. 03-1274, NY Resp. Br., 34, n. 9.

19 C.A. App. 328-355. Also See Amicus Br. of Ohio, *et al.* at 25, No. 03-1274, NY Resp. Br., 34-35.

20 ATF Industry Circular No. 96-3, Direct Shipment Sales of Alcohol Beverages (Feb. 11, 1997) cited in the Br. of Resp., at 46, was modified by a TTB ruling found at: http://www.atf.gov/pub/qtrly_bulletins/ vol2_qb 2000/rulings.pdf.

required to obtain basic permits under the (FAA Act)," Federal Alcohol Administration Act, 27 U.S.C. § 201 *et seq. Id.* TTB has also made it clear on its Internet site that for the most part it leaves the regulation up to the States.[21]

Certain *Amici* Congressmen, mainly from the State of California, claim that the 21st Amendment Enforcement Act of 2000, 27 U.S.C. § 122a, somehow reaffirmed that States were not delegated the authority to regulate out-of-State shipments. *Mem. Cong. Amici Br.*, 1-3, 19-21. The fallacy of this argument, of course, is that the Act itself does nothing more than provide an injunctive enforcement method the States can employ against illegal shippers provided they are engaged in a "valid exercise of power" under the 21st Amendment as interpreted by the Supreme Court in conjunction with other provisions of the Constitution. 27 U.S.C. § 122a (e)(1). The statute does not specify what constitutes the 21st Amendment power of the States, it does not specifically exclude States that ban direct shipping from its benefits, and it does not conclude that Michigan law is unconstitutional. That issue is presently before this Court and the 21st Amendment Enforcement Act is not.[22]

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21 At: http://www.atf.gov/alcohol/info/faq/genalcohol.htm#g5

22 The Cargo Airline Association Amici assert that the Federal Aviation Administration Authorization Act of 1994 (FAAAA), 108 Stat. 1569, 1605-1607, preempts Michigan's shipment laws pertaining to distribution of alcohol, specifically, MCL 436.1203(1). Cargo Airline Amici Br., 6-24. This assertion, well outside of the terms of the grant of certiorari, Sup. Ct. R. 14.1(a), is untenable. The 21st Amendment protects State importation controls even if Congress should repeal the Webb-Kenyon Act and declare free trade in alcoholic beverages. That is why section 2 was placed in the 21st Amendment. Congress may not evade the Constitution indirectly by deregulating the means by which alcoholic beverages are imported. That argument would prohibit importation controls even for "bone-dry" States, which prohibit the manufacture, sale, and importation of alcoholic beverages.

Michigan categorically rejects Respondents' assertion that the regulatory concerns of the State with respect to out-of-State direct shipments are unfounded. Respondents go so far as to claim that there is no evidence that minors are buying, or would buy, wine or liquor from out-of-State shippers. This is simply wrong.[23] An example of the severity of the problem is shown in recent press reports from the State of Washington. There "a bunch of Gonzaga University students . . . ordered liquor, beer and wine 'on-line' and had it delivered to their door steps without ever being questioned about their age."[24] A demand was made to the Washington State Attorney General to take action against Internet retailers. Similarly, in June of this year, the Massachusetts Attorney General "filed a lawsuit against four Internet retailers from four different States for selling alcohol to minors." *Id.*[25]

C. The staff Federal Trade Commission (FTC) report cited by Respondents is neither credible nor persuasive.

The staff Federal Trade Commission (FTC) report, cited by Respondents and their *Amici*, claiming that States that allow

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[23] C.A. App. 92-93 (Stewart Interrog. 2). (In one year 3624 controlled buy operations with underage decoys were conducted and 29% of those retailers made attempted sales to the undercover (decoy) minors.) C.A. App. 322-324 (Smith Aff'd.), 325-327 (Mead Aff'd.), 356-360, 448-472. Respondents' assertion that the State does not do inspections is also wrong. (2507 investigations conducted of licensees approving adequate physical plant, building code and sales compliance, and many other factors which of necessity encompass frequent inspections.) C.A. App. 322-324. Also see D.C. R 54, Ex 11, Attach C, (showing enforcement actions against Michigan Wine Makers and Brew Pubs).

[24] At: http://seattlepi.nwsource.com/local/185415_liquor09.html. (Seattle Post-Intelligencer (8/9/04)). For other examples, see Michigan Assoc. of Sec. Sch. Prin., et al., Amici Br., 10-22.

[25] Obtaining jurisdiction over out-of-State entities shipping alcohol is a nightmare. See Pet. Br., 33, n. 24.

out-of-State direct shipments are not experiencing problems, is neither credible nor persuasive.[26] The report is not based upon any independent research studies or findings. It is mainly based on ten States' responses to a questionnaire sent out by the staff of the FTC. Eight of those States had not even conducted investigations on the issue. *FTC Report* at 31-33. The report did note "that Michigan found that '[a]bout one in three websites contacted' (roughly 33%) agreed to sell alcohol to the minor with no more age verification than a mouse click, and that UPS delivery people did not properly verify the recipients' ages." It also noted that other States found that minors can buy wine online. *Id.* at 35. It does not focus on the merits of the tax debate and it relies on a self-serving statement by the Wine Institute (a trade association of pro-direct shipment interests) that its members will comply with the law and pay taxes. *Id.* at 39-40.

IV. Effectuation of the plain language of the 21st Amendment as an exception to the Commence Clause does not undermine other valid Commerce Clause applications.

A. Bacchus is distinguishable and is not controlling.

As shown in Pet. Br., 27-29, *Bacchus Imports, Ltd. v Dias*, 468 U.S. 263 (1984), is distinguishable on its facts and, therefore, not controlling. Michigan (like its *Amici* States) respectfully suggests that *Bacchus* was erroneously decided or that it should be limited to its facts, *i.e.*, where a State explicitly disavows any regulatory purpose in alcoholic beverage laws.

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[26] FTC, Staff Report, 7/3/03, at: http://www.ftc.gov/os/2003/07/winereport2.pdf. Compare Amicus brief for Ohio, et al, p. 26, describing State concerns and problems.

Respondents' statement that, "Not a single opinion by any Justice has called *Bacchus* into question," is simply incorrect. Resp. Br., 29. See, e.g., *City of Newport v. Iacobucci*, 479 U.S. 92, 98 (1986) (Stevens, J., specifically referenced *Bacchus* in his dissent with whom Brennan, J., joined, when he said in no uncertain terms that the Court has completely distorted the 21st Amendment); *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 352-360 (1986) (O'Connor, J., dissenting, joined by Rehnquist, C.J., called *Bacchus* into serious question); and *James B. Distilling Co. v. Georgia*, 501 U.S. 529, 557 (1991) (O'Connor, J., with whom Rehnquist, C.J., and Kennedy, J., joined, stating that "The court's conclusion in *Bacchus* was unprecedented.")

Justice Stevens, dissenting in *Bacchus*, correctly noted that the majority adopted a "totally novel approach to the Twenty-first Amendment." *Bacchus*, 468 U.S. at 286-287 (Stevens, J., dissenting). The proper question then and now "is not one of 'deference,' nor one of 'central purposes'; the question is whether the provision in this case is an exercise of a power expressly conferred upon the States by the Constitution. It plainly is." *Id.* at 287. Clearly, Michigan's out-of-State direct shipment ban falls "squarely within the protection given to" it by the 21st Amendment, "which expressly mentions 'delivery or use therein.'" *Id.* at 280.

Revisiting *Bacchus* would not require reconsideration of any other decision of this Court. It would prevent lower courts from misreading that decision as a general warrant to strike down State regulation of the importation, distribution, and sale of alcoholic beverages because some other State has chosen to live with less effective regulation or because the challenged law does not comport with some other conception of reasonableness.

B. The 21st Amendment creates an exception for alcoholic beverages from traditional Commerce Clause considerations.

The late nineteenth century saw the development of an "unedifying history" (*Carter v. Virginia*, 321 U.S. 131, 142, J. Frankfurter, concurring [1944]) of a body of case law that applied a rigid formulation of the dormant Commerce Clause, frustrating State efforts to establish effective alcoholic beverage importation regulations. That analysis treated alcoholic beverages the same as other items of commerce, like cheese, for purposes of Commerce Clause analysis even as it held that the police power of the State otherwise permitted much more extensive regulation of alcoholic beverages than of almost all other products. Congress recognized that alcohol is not like cheese, however, and soon made changes to effectuate the distinctions. The Wilson Act, and subsequently the Webb-Kenyon Act and the 21st Amendment, were each efforts, along different lines, to undue that nineteenth century jurisprudence. Each of those enactments gave States progressively greater control over the importation of alcoholic beverages.

Affirming Michigan's constitutional authority to enforce effectively its regulatory system for the importation, distribution, and sale of alcoholic beverages under the 21st Amendment has no necessary implications for dormant Commerce Clause analysis in general. Citations to Commerce Clause opinions of this Court and quotations from Justice Jackson in *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525 (1949) are irrelevant. See NBWA Amicus Br., 8 n. 5. In *Duckworth v. Arkansas*, 314 U.S. 390, 397-402 (1941), Jackson, J., concurred in the result, asserting that failure to uphold State laws by reference to the 21st Amendment, instead holding them reasonable under the dormant Commerce Clause, weakened both the 21st Amendment and the dormant Commerce Clause. To him, affirming State alcoholic beverage law by reference to the 21st Amendment was consistent with a

strong dormant Commerce Clause. The 21st Amendment authorizes a constitutional regime for alcoholic beverages that is distinct from that for other products. The Webb-Kenyon Act and the 21st Amendment were clearly efforts to overcome Commerce Clause constraints on the States that this Court had found in its pre-Webb-Kenyon jurisprudence.

Respondents quote James Madison for the principle of a strong economic union but Madison also wrote "the powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." The Federalist No. 45, pp 292-293 (C. Rossiter ed. 1961). The Respondents are asking this Court to rewrite the 21st Amendment and Webb-Kenyon Act by blue-penciling out powers that have been explicitly given to the States. This Court should decline the invitation.

CONCLUSION

The decision of the United States Court of Appeals for the Sixth Circuit should be reversed.

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IN THE

Supreme Court of the United States

MICHIGAN BEER & WINE WHOLESALERS ASSOCIATION,
Petitioner,

v.

ELEANOR HEALD, *et al.*,
Respondents.

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

REPLY BRIEF FOR PETITIONER

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The Michigan plaintiffs (respondents in No. 03-1120) concede that (i) States have unique interests in regulating the distribution of beverage alcohol to their citizens (Br. 10, 22, 43); (ii) States cannot effectively regulate such distribution unless they can control the flow of beverage alcohol across their borders (Br. 22); and (iii) the Twenty-first Amendment and the Webb-Kenyon Act were therefore adopted and worded to carve an exception to the dormant Commerce Clause (Br. 21).

Plaintiffs argue that the constitutionally authorized barrier against unlicensed imports that Michigan (like most other States) has had in place since Prohibition comes tumbling down because the State gives one class of state licensees, who are physically located in the State and subject to its life-or-death regulation, a privilege of shipping directly to customers that is not extended to unlicensed out-of-state entities. Their argument is that the difference in regulation is "discrimination" that eliminates Twenty-first Amendment protection and subjects Michigan's law to "strict scrutiny" to see whether the interests of Michigan and its residents would be just as well protected by a less restrictive approach than the Legislature has chosen.

But there is no constitutional principle that States must treat out-of-state and in-state suppliers of beverage alcohol identically or equally, nor (with respect to this product) is there a national preference for open competition, minimal regulation, maximal availability, and low prices. The Twenty-first Amendment and Webb-Kenyon protect the States' broad discretion over the distribution of alcohol to their residents, by giving the States "virtually plenary" control over physical importation. Nothing in their language or history or in this Court's cases suggests that state control over importation is to be limited by the way a State regulates purely in-state distribution activities. All that the Constitution requires is that state regulation of the importation or transportation of beverage alcohol, including any distinctions the State chooses to draw, be rational (as congressional regulation of other parts of commerce must be) and

not violate other provisions of the Constitution that the Twenty-first Amendment was not intended to affect.

Even if it were the responsibility of the courts, rather than the Michigan Legislature, to determine what regulatory system works best in Michigan, plaintiffs have not shown how a State can effectively enforce its restrictions on the distribution of alcoholic beverages and collect its tax revenues if it must permit direct shipment by out-of-state entities. A court-imposed permit system licensing an unbounded number of out-of-state sellers would overwhelm Michigan regulators and leave them without their most effective tool: the ability to put violators out of business. The federal enforcement mechanisms that plaintiffs cite are weak substitutes, and forcing Michigan to rely on them is inconsistent with the basic allocation of responsibility that the Twenty-first Amendment established.

If Michigan cannot draw rational distinctions between out-of-state and in-state suppliers of alcoholic beverages, there is no obvious reason why it would not be required to allow any out-of-state wholesaler to ship wine, beer, and spirits to in-state retailers, and to allow any out-of-state retailer to ship wine, beer, and spirits directly to consumers. That would largely mean the end of the three-tier system of regulation that this Court has called "unquestionably legitimate." *North Dakota* v. *United States*, 495 U.S. 423, 432 (1990) (plurality opinion of Stevens, J.); *see also id.* at 447 (Scalia, J., concurring in judgment). This case is not about "fine and rare wines" but about the viability of the entire system of alcohol regulation that the States have relied upon for 70 years.

I. WEBB-KENYON AND THE TWENTY-FIRST AMENDMENT NEITHER INCORPORATE NOR PERMIT ANY REQUIREMENT THAT STATES TREAT OUT-OF-STATE AND IN-STATE SUPPLIERS IDENTICALLY.

Webb-Kenyon and the Twenty-first Amendment grant the States authority to regulate the "transportation or importation" of beverage alcohol. Neither the texts of these provisions nor their historical background authorize the imposition of a requirement that States either treat out-of-state suppliers identically with in-state licensees or face strict judicial scrutiny.

1. Plaintiffs argue that Webb-Kenyon and, by implication, the Twenty-first Amendment "only prohibit[] shipments into dry areas" (Br. 10), and that they therefore "cannot be read" to displace the dormant Commerce Clause in States (such as Michigan) that regulate, but do not bar, the distribution of alcohol (Br. 10, 34; *see also* Br. 21, 23-25 & n.9). That argument rests on misreading *Seaboard Air Line Railway* v. *North Carolina*, 245 U.S. 298 (1917). The passage plaintiffs cite is the Court's summary of the respondent's position in that case. *See id.* at 303. On the next page, the Court rejects that position, and the actual holding of *Seaboard* is the opposite of what plaintiffs claim: "[I]nstead of interposing an absolute bar against all ... shipments [of imported alcohol], as it was within the power of the state to do," North Carolina had the authority under Webb-Kenyon to "permit[] them upon conditions .... The greater power includes the less." *Id.* at 304.[1]

Representative Webb made this clear at the adoption of Webb-Kenyon in 1913. It "applies to all States, 'wet' and 'dry' alike, because every State in the Union has laws against the unrestricted sale of liquor, and this bill would protect the 'wet' States whose laws are to be violated in the use or sale of liquor as well as it would protect the 'dry' States under the same circumstances. It is a State rights measure." 49 Cong. Rec. 2,812 (1913). The later adoption of nearly identical language in the Twenty-first Amendment in

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[1] Other pre-Twenty-first Amendment cases are consistent. *See Rainier Brewing Co.* v. *Great N. Pac. S.S. Co.*, 259 U.S. 150, 154 (1922) (interpreting Webb-Kenyon to authorize State to limit quantity of alcohol that citizens could import and manner in which it could be shipped); *Clark Distilling Co.* v. *Western Md. Ry. Co.*, 242 U.S. 311, 324 (1917) (Webb-Kenyon Act "operated ... irrespective of whether the state law did or did not prohibit the individual use of liquor."); *cf. Vance* v. *W.A. Vandercook Co.*, 170 U.S. 438, 447 (1898) (Wilson Act).

1933, and the re-enactment of Webb-Kenyon in 1935, ratified the Court's interpretation of Webb-Kenyon in *Seaboard*.[2]

2. The texts of the Twenty-first Amendment and Webb Kenyon broadly prohibit exactly what plaintiffs seek to do here, without any suggestion that state laws must treat out-of-state suppliers identically or equally with in-state licensees. *See* MB&WWA Br. 15. Plaintiffs nevertheless argue (Br. 20-25) that these provisions were adopted only to reverse the "*Bowman/Rhodes* line of cases and did not affect the rule against discrimination" plaintiffs say was established in cases such as *Tiernan* v. *Rinker*, 102 U.S. 123 (1880), and *Walling* v. *Michigan*, 116 U.S. 446 (1886), and that there is no legislative history specifically approving state laws treating out-of-state and in-state entities differently.

But, first, there would be no warrant for limiting the protection clearly granted by the Amendment and Webb-Kenyon because of supposed silence in their legislative histories. As the Court demonstrated in interpreting the Amendment itself shortly after adoption (*see infra* pp. 7-9), "where the language is unambiguous, silence in the legislative history cannot be controlling." *Dewsnup* v. *Timm*, 502 U.S. 410, 419-420 (1992); *see also Hibbs* v. *Winn*, 124 S. Ct. 2276, 2300 (2004).

Second, the legislative history is *not* silent. An initial draft of Webb-Kenyon included nondiscrimination language, but Congress, on clear notice that States might discriminate between in-state and out-of-state suppliers, chose not to include that language in either Webb-Kenyon or the Twenty-

[2] Plaintiffs also cite several statements in the legislative history as establishing that "[t]he core concern of the legislative drafters of . . . the Twenty-First Amendment" was to ensure that dry States could remain dry after Repeal. Br. 25 n.9. But while this was obviously an objective, it was hardly the only one. The statements cited by plaintiffs are perfectly compatible with the many statements showing that Congress intended to protect state rights more broadly. *See* MB&WWA Br. 21-22.

first Amendment. *See* MB&WWA Br. 24.[3] In historical context, this choice must be read as intentional—and it was so read at the time in a judicial decision that MB&WWA cited but that plaintiffs fail to address. *See Dugan* v. *Bridges*, 16 F. Supp. 694, 704 (D.N.H. 1936). As Senator Blaine put it during the deliberations, the Amendment gave States "*absolute control in effect* over interstate commerce affecting intoxicating liquors which enter the confines of the States." 76 Cong. Rec. 4,143 (1933) (emphasis added).[4]

Third, *Bowman* v. *Chicago Northwestern Railway*, 125 U.S. 465 (1888), *Rhodes*, *supra*, *Tiernan*, *supra*, and *Walling*, *supra*, all rested on the *same* principle—that importation of alcohol was interstate commerce with which States could not interfere. *See Walling*, 116 U.S. at 461; *Tiernan*, 102 U.S. at 127. Indeed, the Court stated in *Bowman* that "[t]he present case is concluded, we think, by the judgment of this Court in *Walling*," 125 U.S. at 495, and the Court expressly rejected any attempt to distinguish *Walling* on the grounds that the statute there "made a discrimination" in favor of in-state citizens, *id.* at 496. Rather, the operative principle in both cases was that "[i]nterstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce . . . ." *Id.* (quoting

[3] *Amici* DKT Liberty Project (DKT) and Napa Valley Vintners (NVV) attempt to dismiss the Senate's deletion of the nondiscrimination language as merely a procedural maneuver in order to conform the Senate version of the bill to the House version. *See* DKT Br. 17-18 n.5; NVV Br. 17. At best, that does not answer why the House bill omitted that language in the first place.

[4] *Amicus* NVV misreads (NVV Br. 16-17) the statement by Senator Stone that the Webb-Kenyon Act would "put the shipper outside of [a State] upon a level . . . with the shipper within the State." 49 Cong. Rec. 2,917 (1913). In context, Senator Stone was merely explaining that Webb-Kenyon would remedy a perverse consequence of the Wilson Act, namely that out-of-state manufacturers could ship to in-state customers while in-state shippers could not. *See generally Rhodes* v. *Iowa*, 170 U.S. 412 (1898). Senator Stone later clarified that Webb-Kenyon was designed to "enable the State to enforce its own internal policy" and "[h]ow [the liquor traffic] shall be regulated is a question each State should answer for itself . . . ." 49 Cong. Rec. 2,917 (1913).

Robbins v. *Shelby County Taxing Dist.*, 120 U.S. 489, 497 (1887)). When Webb-Kenyon and the Twenty-first Amendment rejected that principle, they overturned all four cases, destroying the foundation of *Tiernan* and *Walling* as well as that of *Bowman* and *Rhodes*.[5]

Fourth, and most important, the Twenty-first Amendment and Webb-Kenyon are themselves inherently "discriminatory" in the sense plaintiffs mean, because they focus on "importation" to enable States to deal with the inherent difference between out-of-state suppliers and in-state licensees. *See Bridenbaugh* v. *Freeman-Wilson*, 227 F.3d 848, 853 (7th Cir. 2000). Out-of-state suppliers are not effectively subject to the full range of state regulation, so Michigan and other States have chosen to require that when they sell for in-state consumption, they do so through another firm that is. This treatment of out-of-state producers as a distinct class follows naturally from the States' constitutional and statutory authority to regulate "importation."

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[5] As the Court noted in *Clark Distilling*, Webb-Kenyon's official title was "An Act divesting intoxicating liquors of their interstate character in certain cases," 242 U.S. at 321, and the statute was enacted to "prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in States contrary to their laws," *id.* at 324. If imported alcohol is divested of its "interstate character" and stripped of the "immunity characteristic" ordinarily accorded by the Constitution, it must be treated, for constitutional purposes, as *intra*state commerce—*i.e.*, subject to the plenary regulatory power of the State, which is subject to constitutional challenge only to the same very limited extent as other state internal economic regulation.

Amicus DKT asserts that "discriminatory laws are not proper or bona fide police laws in the first place" (DKT Br. 15), but it cites no source for any such free-floating restriction on state legislative power. The cases that DKT does cite are cases in which the police power was limited *by the dormant Commerce Clause*. *See, e.g.*, *Vance*, 170 U.S. at 455; *Scott* v. *Donald*, 165 U.S. 58, 91 (1897) ("We cheerfully concede that the [discriminatory] law in question was passed in the bona fide exercise of the police power," but that statute still may be "repugnant to the constitution of the United States"); *Walling*, 116 U.S. at 455. Since the Amendment rendered that doctrine inapplicable to restrictions on alcohol importation, the States' police power is not subject to any other limitation.

3. Finally, plaintiffs' argument (Br. 19-20) that this Court should read a nondiscrimination clause into the Twenty-first Amendment, because it has previously read exceptions into the Amendment to protect personal constitutional rights and Congress's authority to enact legislation, misses the point. None of the constitutional provisions or federal laws at issue in those cases played any role in the adoption of Webb-Kenyon and the Twenty-first Amendment. The purpose of Webb-Kenyon and the Twenty-first Amendment, as plaintiffs concede (Br. 21), was to exempt States from the dormant Commerce Clause. At least after the Twenty-first Amendment, there is no constitutional right to have beverage alcohol as widely and cheaply available as possible, or to sell into a State on the same terms as an in-state licensee.[6]

II. THIS COURT'S CASES REFUTE PLAINTIFFS' CONTENTION THAT ANY STATE STATUTE THAT DRAWS A DISTINCTION BETWEEN IN-STATE AND OUT-OF-STATE ALCOHOL SUPPLIERS IS SUBJECT TO STRICT SCRUTINY.

This Court's cases have consistently interpreted the Twenty-first Amendment to allow States to draw rational distinctions between in-state and out-of-state suppliers of alcoholic beverages. In adopting the Twenty-first Amendment, the Nation gave each *State* the authority to regulate one small portion of interstate commerce—the "transportation or importation" of alcohol into the State "for delivery or use therein"—and nothing in this Court's case law suggests

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[6] The Privileges and Immunities Clause argument raised by *amicus* Virginia Wineries Association is not properly before the Court: it was never raised by the Michigan plaintiffs and was excluded from the grant of certiorari in the New York case. For a similar reason, the argument of *amicus* Cargo Airline Association ("CAA") that § 601 of the Federal Aviation Administration Authorization Act (FAAAA), 49 U.S.C. §§ 14501(c)(1), 41713(b)(4)(A), preempts Michigan's alcohol regulations should be rejected. *See* CAA Br. 12. This argument—which goes far beyond plaintiffs' discrimination argument and would condemn virtually all state laws governing alcohol importation—has never previously been raised in this case or in any of the direct-shipment litigation nationwide.

that a State's exercise of that authority is subject to greater judicial scrutiny than Congress itself receives when it legislates pursuant to the Commerce Clause.

Plaintiffs misdescribe this Court's first case interpreting the Twenty-first Amendment, *State Board of Equalization* v. *Young's Market Co.*, 299 U.S. 59 (1936), which established that States may discriminate against out-of-state alcohol. Contrary to plaintiffs' suggestion (Br. 26), the Court's opinion expressly recognized that the California law at issue (which the Court upheld) discriminated against out-of-state alcohol. California imposed a $500 license fee for the privilege of importing alcohol, and the Court noted that the State did not "exact[] an equal fee for the privilege of transporting domestic beer from its place of manufacture to the wholesaler's place of business."[7] Indeed, the California law was essentially the same as the laws struck down in *Tiernan* and *Walling*.[8] *Young's Market* upheld the California statute and thus effectively overruled *Tiernan* and *Walling*, because of the intervening adoption of the Twenty-first Amendment.

The Court's statement in *Young's Market* that the case did "not present a question of discrimination prohibited by the commerce clause," 299 U.S. at 62, read in context, did not mean that there was *no* discrimination, but rather that the statute's problems under the Commerce Clause went well beyond discrimination: the statute directly regulated interstate commerce by taxing importation and, under the *Case of the State Freight Tax*, 82 U.S. (15 Wall.) 232 (1872), *that* problem could not be remedied simply by equally burdening in-state beer. *See Young's Market*, 299 U.S. at 62. The Court, however, held that the Twenty-first Amendment eliminated *all* dormant Commerce Clause objections to stat-

[7] The $750 fee cited by plaintiffs (Br. 26 n.10) applied to *manufacturers* of beer and was not analogous to the $500 fee imposed on *wholesalers* that imported out-of-state beer. *See Young's Market*, 299 U.S. at 64.

[8] *See Walling*, 116 U.S. at 454 (striking down $300 Michigan tax on persons selling alcohol imported from out-of-state); *Tiernan*, 102 U.S. at 127 (striking down $200 Texas tax on persons selling beer and wine manufactured out-of-state).

utes regulating alcohol importation. Indeed, the Court specifically rejected the contention that the Twenty-first Amendment gave States authority over importation yet prohibited discrimination: "To say that, would involve not a construction of the Amendment, but a rewriting of it." *Id.* at 62.

The Court's subsequent cases did not (as plaintiffs claim) merely "characterize *Young's Market* as affirmatively holding that 'discrimination against imported liquor is permissible.'" Br. 26. Both *Mahoney* v. *Joseph Triner Corp.*, 304 U.S. 401 (1938), and *Indianapolis Brewing Co.* v. *Liquor Control Commission of State of Michigan*, 305 U.S. 391 (1939), expressly *held* that the Twenty-first Amendment permits States to enact "clearly discriminat[ory]" laws. *Mahoney*, 304 U.S. at 403. Plaintiffs studiously avoid discussing the facts of these cases, and with good reason: *Mahoney* upheld a law that limited the importation of liquor stronger than 50 proof without limiting its in-state manufacture, 304 U.S. at 402-403, and *Indianapolis Brewing* upheld a statute that prohibited in-state dealers from selling any beer from Indiana or nine other States, 305 U.S. at 392. And there is absolutely no support for plaintiffs' assertion that the Court "characterized the law at issue [in *Indianapolis Brewing*] as nondiscriminatory." Br. 26 n.10. To the contrary, the Court upheld the law on the principle that "discrimination between domestic and imported intoxicating liquors . . . is not prohibited by the equal protection clause." 305 U.S. at 394.[9]

[9] Plaintiffs highlight (Br. 13-14) the Court's opinion, written by Justice Jackson, in *H.P. Hood & Sons, Inc.* v. *Du Mond*, 336 U.S. 525 (1949), which extolled the virtues of unrestricted interstate commerce, but nothing in that opinion contradicts the Court's contemporaneous view that alcohol was different. As then-Solicitor General Jackson stated in 1939, "[A]n exception was made to the generally exclusive power of Congress, and control of commerce between States in intoxicating liquors was handed back to the States of destination." Robert H. Jackson, *Trade Barriers—A Threat to National Unity*, in *Trade Barriers Among the States: The Proceedings of the National Conference on Interstate Trade Barriers* 75 (1939). Even legislation that discriminated to protect local interests, Jackson said, "is quite properly sustained by the Supreme Court." *Id.* at

Plaintiffs are equally wide of their mark in their interpretation of the Court's more recent decisions. Plaintiffs and *amici* repeatedly cite the Court's statement in *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964), that the Twenty-first Amendment did not repeal the Commerce Clause. Br. 21, 27. The Court was referring, however, to whether the Twenty-first Amendment repealed Congress's *affirmative* power under the Commerce Clause (something not at issue here). *See Hostetter*, 377 U.S. at 332 ("If the Commerce Clause had been *pro tanto* 'repealed,' then Congress would be left with no regulatory power over interstate or foreign commerce in intoxicating liquor."). The Court strongly reaffirmed that the Twenty-first Amendment immunized state laws against *dormant* Commerce Clause challenges. *See id.* at 330.

In *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263 (1984), the Court struck down a discriminatory excise tax in Hawaii, but plaintiffs fail to explain the Court's basis for doing so. Neither Hawaii nor the Court could identify any justification for the difference in Hawaii's treatment of in-state and out-of-state alcohol other than protectionism. The tax, in other words, was "not supported by *any* clear concern of the Twenty-first Amendment," *id.* at 276 (emphasis added), and it thus failed rational-basis review. *Bacchus* never suggested that Hawaii's distinction between in-state and out-of-state alcohol triggered "strict scrutiny." Quite the opposite: the Court's actual holding was that state laws constituting "mere economic protectionism" are "not entitled to *the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor*." *Id.* (emphasis added). A state law that draws a distinction between in-state and out-of-state alcohol that is related to the concerns of the Twenty-first Amendment is entitled to deference.[10]

76; *see also Duckworth* v. *Arkansas*, 314 U.S. 390, 398-402 (1941) (Jackson, J., concurring in result).

[10] Plaintiffs also are wrong that Hawaii's excise tax was "obviously a regulation of the 'importation' of liquor into the State." Br. 29. The tax was imposed at wholesale, *after* liquor was imported, and was not an exercise of the core power to control physical importation.

Plaintiffs are also wrong to suggest (Br. 27) that *Brown-Forman Distillers Corp.* v. *New York State Liquor Authority*, 476 U.S. 573 (1986), and *Healy* v. *Beer Institute, Inc.*, 491 U.S. 324 (1989), applied plaintiffs' "nondiscrimination" principle to strike down state alcohol regulations. *Brown-Forman* was not based on discrimination at all but on the fact that New York's regulation "directly regulate[d] interstate commerce." *Brown-Forman*, 476 U.S. at 582. In *Healy*, the Court found two Commerce Clause problems with the Connecticut price-affirmation statute: its extraterritorial "effect of controlling commercial activity occurring wholly outside the boundary of the State," *Healy*, 491 U.S. at 337, and its "discriminat[ion] against interstate commerce," *id.* at 340. The "discrimination," however, was not a distinction between in-state and out-of-state suppliers, and the Court did not cite *Bacchus*. It was an (apparently accidental) discrimination *among* entities that sold beer in Connecticut, penalizing those that also sold elsewhere (including in-state entities). *Id.* at 341. The ruling was consistent with the Court's theme that Connecticut could not project its regulatory regime into other States. Moreover, the Court held that the Connecticut statute fell outside the protection of the Twenty-first Amendment not because of the "discrimination" but only because of the extraterritorial effect. *See id.* at 342 ("Here, as in *Brown-Forman*, our finding of unconstitutional extraterritorial effects disposes of the Twenty-first Amendment issue.").[11] *Healy* thus leaves intact the Twenty-first Amendment's protection for a statute like Michigan's, which does *not* regulate liquor sales in other States.

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[11] Justice Scalia, writing only for himself, stated that the statute's "discriminatory character eliminates the immunity afforded by the Twenty-first Amendment," 491 U.S. at 344, but as noted, the "discrimination" at issue was against firms that also did business out of state, not in favor of in-state suppliers.

Indeed, just one year after *Healy*, the Court in *North Dakota* upheld a state regulatory scheme that imposed special reporting and labeling requirements on alcohol importers and out-of-state distillers. *See* 495 U.S. at 428-429. Despite the facial distinction between in-state and out-of-state alcohol that North Dakota drew, the Court did not apply strict scrutiny. Instead, the Court upheld the labeling and reporting requirements because, in the words of the plurality opinion, they "f[e]ll within the core of the State's power under the Twenty-first Amendment," *id.* at 432, and they "unquestionably serve valid state interests," *id.* at 433.[12]

III. MICHIGAN'S DISTINCTION BETWEEN IN-STATE AND OUT-OF-STATE DIRECT SHIPMENT IS REASONABLY CALCULATED TO ACHIEVE LEGITIMATE STATE INTERESTS.

Plaintiffs attempt to draw the Court into the minutiae of alcohol regulation, arguing that other regulatory rules could protect Michigan as well as its current system, and that Michigan's regime therefore does not meet strict scrutiny. But strict scrutiny is not the standard. The proper standard of review is rational-basis scrutiny, and Michigan's regime easily passes that test. As explained below, the distinction that Michigan draws between in-state and out-of-state direct shipping is rationally related to the temperance and tax collection goals of the Twenty-first Amendment. Michigan's regime may not be the only way to way to achieve those goals, but under the Twenty-first Amendment, it is a constitutionally protected way.

[12] Plaintiffs distort the Seventh Circuit's holding in *Bridenbaugh*. The Indiana statute was for present purposes indistinguishable from Michigan's. *See* 227 F.3d at 851 (Indiana permits "local wineries, but not [out-of-state] wineries . . . to ship directly" to consumers). The Seventh Circuit upheld the statute because there was no "functional discrimination," *id.* at 853, since the law simply "ma[d]e alcohol from every source equally amenable to state regulation," which "is precisely what § 2 [of the Twenty-first Amendment] is for," *id.* at 854.

A. Underage Drinking Is A Real Concern Posed By Direct Shipping.

Plaintiffs dismiss the concerns expressed by Michigan, the 33 other States that support Michigan, the National Conference of State Liquor Administrators, and the Michigan Association of Secondary School Principals, among others, about the effect on underage drinking if States should now lose their control over direct shipping.[13] The arguments of a financially interested California winery and a handful of Michigan oenophiles should not obscure the real concerns of those who deal with underage drinking on a daily basis.

The argument of plaintiffs that "[t]here is simply no evidence that . . . direct shipment would be a likely strategy for minors seeking to purchase liquor" (Br. 37) is false. In a Wirthlin survey, 35 percent of college students under 21 said they would be likely to purchase alcohol online if they could get away with it. C.A. App. 358. Indeed, minors are already having alcohol shipped to their homes. As plaintiffs note, one study showed that 10 percent of surveyed high-school seniors said they had used home delivery services to order alcohol. *See* Linda A. Fletcher et al., *Alcohol Home Delivery Services: A Source of Alcohol for Underage Drinkers*, 61 J. Studies on Alcohol 81, 82 (2000). That the participants in the survey ordered from local retail stores, not out-of-state suppliers, hardly helps plaintiffs' argument. It demonstrates that minors can wait for alcohol to be delivered, and in this age of overnight delivery services it hardly takes "several days" (Br. 37) to ship alcohol across the country.

Plaintiffs' argument that minors are unlikely to drink wine (Br. 37) is both wrong and irrelevant. It is wrong because about 13 percent of 12th graders (more than a quarter of the 12th graders who report drinking alcohol) say they

[13] *See* Ohio and 32 Other States Br. 23-24; Mich. Ass'n of Secondary School Principals Br. 3-23; Nat'l Alcohol Beverage Control Ass'n Br. 11; Ill. Alcoholism and Drug Dependence Ass'n Br. 5-16.

have consumed wine in the past 30 days.[14] It is irrelevant because, as discussed below in Part IV, plaintiffs' position would logically require States to permit direct shipment not only of wine, but of beer and spirits as well.

The Federal Trade Commission ("FTC") staff report on which plaintiffs heavily rely does *not* show the "twenty-six States that permit direct shipping have encountered no . . . problems." Br. 36. That conclusion was based entirely on the responses of 11 states to a questionnaire sent by the FTC. *See* Staff of the FTC, *Possible Anticompetitive Barriers to E-Commerce: Wine* 31-34, App. B (July 2003) ("FTC Staff Report").[15] None of those 11 States, however, had conducted any active investigation, making the FTC staff's "finding" virtually worthless.[16] As explained by *amici*, the only real way to detect illegal sales to minors is through "stings," since neither minors nor retailers report illegal sales, and such sales otherwise come to light only by chance as States investigate crimes or traffic accidents that happen to be related to an illegal purchase. *See* Mich. Ass'n of Secondary School Principals Br. 11-12.

The States that have investigated the problem have found that alcohol can be purchased by minors over the Internet with alarming ease. Michigan, for example, con-

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[14] National Institutes of Health, *Monitoring the Future: National Survey Results on Drug Use, 1975-2003* (Aug. 2004), Vol. I, at 501, 512, *available at* http://www.monitoringthefuture.org/pubs/monographs/vol1_2003.pdf. Five percent of 12th graders reported drinking 5 or more glasses of wine in a row within the past two weeks. *Id.* at 513. Furthermore, the Fletcher study did not find that the illegal deliveries reported in that study "were mostly of keg beer." Br. 38. The study revealed only that retailers that delivered alcohol were more likely than other retailers to sell keg beer; it made no attempt to determine what alcohol those retailers sold to minors. *See* Fletcher, *supra*, at 83.

[15] *Available at* http://www.ftc.gov/os/2003/07/winereport2.pdf.

[16] North Dakota's response, for example, to the question "Have you had problems with out-of-state or in-state shippers shipping wine directly to minors?" was "No information." FTC Staff Report, *supra*, App. B. The State of Washington stated bluntly that out-of-state direct shipping "is a problem of concern" on a nationwide basis. *Id.*

ducted a series of stings, which revealed that one-third of the websites contacted allowed minors to purchase wine "with no more age verification than a 'click' of the mouse."[17] Massachusetts recently conducted a similar sting and discovered that underage college students were able to order beer, wine, and spirits from online retailers without having to verify their age. *See* Ohio and 32 Other States Br. 23.

B. Out-Of-State Alcohol Suppliers Cannot Be Regulated As Effectively As In-State Suppliers.

When they stop trying to deny the dangers posed by direct shipping, plaintiffs fall back to a second argument: that the dangers posed by out-of-state direct shipping are no greater than the dangers of in-state direct shipping and that States therefore do not need to distinguish between in-state and out-of-state entities in order to address these dangers. Plaintiffs propose instead a permit system that would license out-of-state entities to ship directly to consumers. Such a system, however, would overwhelm state regulators and leave them without their most effective tool: the ability to put violators out of business.

Michigan can enforce its alcohol regulations by inspecting licensees, attaching their property, and putting violators out of business by revoking their licenses. Plaintiffs' suggestion that Michigan license out-of-state wineries would not give Michigan anything like the same real power over them. To begin with, Michigan has no way to limit the number of licenses it could be required to grant and no practical way to oversee the thousands of wineries that might ship directly to Michigan consumers. As the Second Circuit noted, "Requiring New York officials to traverse the country to ensure that direct sales to consumers (no matter how small) comply with New York law would render the regulatory scheme useless."

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[17] Irene M. Mead, State of Michigan's Remarks, Federal Trade Commission Workshop, *Possible Anti-Competitive Efforts to Restrict Competition on the Internet* (Oct. 8, 2002) 9-10, *available at* http://www.ftc.gov/opp/ecommerce/anticompetitive/panel/mead.htm; *see also* C.A. App. 322-327.

Swedenburg v. *Kelly*, 358 F.3d 223, 239 (2d Cir. 2004).[18] But even if Michigan could find some way to allocate a finite number of licenses without regard to location (*see* Br. 46), the cost of inspecting wineries as far away as California would be far higher, and plaintiffs cannot be serious in their suggestion (*see* Br. 43) that Michigan should have to depend on California to enforce *Michigan's* regulations against a California winery. Plaintiffs suggest Michigan could defray the higher inspection costs by imposing a higher fee for importation permits, but under plaintiffs' theory of the case, Michigan would have to justify its differential license fees under heightened scrutiny, since out-of-state licensees would inevitably pay more than in-state licensees.[19] Plaintiffs cannot have it both ways. Either Michigan has a right to draw rational distinctions between in-state and out-of-state entities or all such distinctions will end up in litigation.

Moreover, Michigan could threaten a noncompliant out-of-state winery only with the loss of its Michigan license, not with loss of its business. Plaintiffs effectively concede that this would be a less effective sanction and therefore argue that Michigan could instead rely on the federal Tax and Trade Bureau ("TTB") to revoke a noncompliant out-of-state winery's federal license, or could use the Twenty-first Amendment Enforcement Act ("TAEA"), 27 U.S.C. § 122a, to sue the winery in federal court. But neither is an effective substitute for state administrative control over entities

[18] There is no support for plaintiffs' contention (Br. 43 n.19) that Michigan does not conduct inspections or searches of in-state wineries. The interrogatory cited by plaintiffs asked only what steps Michigan has taken "to enforce restrictions on deliveries to consumers" by in-state wineries. C.A. App. 100. Michigan said it had not taken any enforcement action regarding illegal deliveries (because there was no evidence of such deliveries), but Michigan cited other action that it had taken against in-state wineries (*see* D. Ct. Docket No. 54, Ex. 11, Attach. C), and it nowhere suggested that it does not inspect in-state wineries.

[19] None of the examples that plaintiffs cite in which Michigan charges differential fees based on the cost to the State in other regulatory areas (Br. 46) is analogous, since they all pertain to in-state entities; none involves Michigan charging higher fees to out-of-state entities as such.

with an in-state presence. The TTB has hardly "assured the States that will act on their complaints," as plaintiffs claim. Br. 46. In language omitted by plaintiffs, TTB said only that it "*could under appropriate circumstances* take administrative action." ATF Ruling 2000-1, *Direct Shipment Sales of Alcohol Beverages* (emphasis added).[20] Plaintiffs cite no case in which TTB has, in fact, acted on a State's complaint, and TTB denies any authority to take action against an out-of-state *retailer* that ships alcohol directly to a consumer. *See id.* More fundamentally, making enforcement of state laws dependent on federal officers is exactly what the framers of the Twenty-first Amendment did not want. As for the TAEA, there is no reported case in which a State has used it, and the statute hardly matches the deterrence provided by the threat of revoking an in-state entity's license in an administrative proceeding. The TAEA forces a State to litigate in federal courts across the country (to ensure personal jurisdiction), and the only remedy it provides is injunctive relief against further violations of the State's laws. *See* 27 U.S.C. § 122a.[21]

Michigan does, as plaintiffs note, currently license "outstate sellers of wine," Mich. Comp. Laws § 436.1109(9), but that system is not comparable to what plaintiffs propose, and it would not work for regulating direct shipping to consumers. Michigan currently licenses approximately 290 outstate sellers of wine (many of which are distributors that act as agents for numerous brands of wine) making enforcement much more manageable than under a licensing scheme involving thousands of wineries across the Nation. *See* C.A. App. 305-314. Furthermore, the current system allows licensees to ship into Michigan only through a limited number of in-state wholesalers, allowing Michigan regulators to match the records of the out-of-state seller against the re-

[20] *Available at* http://www.atf.gov/alcohol/info/revrule/rules/2000-1.htm.

[21] *Cf. Swedenburg*, 358 F.3d at 239 n.13 (TAEA "while helpful to states, can only be used after a violation occurs. Under section 2, states have the authority to be proactive as well as reactive.").

cords of the in-state wholesaler to ensure that taxes are being collected and the State's other regulations are being respected. This Court has long recognized the importance of "localizing" alcohol sales in this manner.[22] Direct shipments of alcohol from thousands of wineries nationwide to an unlimited number of Michigan consumers would give the State no similar means of verifying regulatory compliance.

Michigan has also found that requiring a licensee with an in-state presence is important to revenue collection. Plaintiffs object to this but, ironically, 11 of the plaintiffs invoked the Fifth Amendment when asked whether they had paid the applicable Michigan taxes on alcohol they had ordered from unlicensed shippers. *See* C.A. App. 363, 372, 381, 386, 392, 399, 405, 423, 429, 435, 441. And plaintiffs' tax evasion is hardly exceptional. One complaint of the plaintiff wine buyers in *Bridenbaugh* was that Indiana's insistence on a state licensee would force them to pay Indiana taxes that California direct-shippers had not been collecting. 227 F.3d at 849-850. There may or may not be a legal problem in forcing out-of-state entities to collect and remit Michigan taxes, *cf.* Br. 41 n.17, *Quill Corp.* v. *North Dakota*, 504 U.S. 298 (1992); C.A. App. 325-355, but there is an obviously greater practical problem when a State has no effective capacity to audit an out-of-state shipper, which has no attachable property in the State and cannot be put out of business.

Finally, plaintiffs' argument that because other States permit some limited forms of direct shipping, the Constitution requires Michigan to do exactly the same is fundamen-

[22] *See Heublein, Inc.* v. *South Carolina Tax Comm'n*, 409 U.S. 275, 282-283 (1972) ("There must be complete records of the quantities, brands, and prices involved at every stage of each liquor sale. By requiring manufacturers to localize their sales, [the State] establishes a check on the accuracy of these records. For example, when a manufacturer can transfer its goods to a wholesaler in the State only after it submits an invoice showing the price and after it receives permission for the transfer, it is easier for the State to enforce its requirement that the wholesale price in [the State] be no higher than that elsewhere in the country. The requirement that sales be localized is, unquestionably, reasonably related to the State's purposes . . . .").

tally inconsistent with the Twenty-first Amendment principle that the choice belongs to each State. The Nation's history of alcohol regulation is that what is desired, or works, in one State may not be suitable for another. And more fundamentally, this case is not about whether all States should adopt some uniform regime of exceptions, but whether States can broadly require all importation to be done by licensed entities with a substantial in-state presence. That is the requirement that the court of appeals struck down.

IV. PLAINTIFFS' READING OF THE CONSTITUTION WOULD DESTROY THE "UNQUESTIONABLY LEGITIMATE" THREE-TIER SYSTEM.

Plaintiffs (wine consumers and one California winery) did not bring this case to eliminate the exception that allows a small number of licensed Michigan wineries to ship directly to their customers. Their objective, in which they succeeded at the Sixth Circuit, was to break down the requirement that all beverage alcohol go through in-state licensees, and their success would undo the three-tier system for regulating beverage alcohol. MB&WWA Br. 39-40. Plaintiffs do not deny this crucial point.

State control over the distribution of beverage alcohol *depends* on the principle that States may require out-of-state entities to sell through licensed in-state entities, even though the requirement is inherently "discriminatory" in the sense in which plaintiffs use that term. The system was conceived as an alternative to establishing state monopolies for the sale of alcoholic beverages in the post-Repeal era. *See* Wine & Spirits Wholesalers of Am. Br. 8-12. States found that they could achieve the benefits of a monopoly system without the burdens if they limited the right to traffic in alcoholic beverages to in-state entities known to, and licensed by, local officials. *Id.* at 10-11. Out-of-state manufacturers were free to introduce their products into the State, but only through the state-monitored three-tier system. *Id.*

Plaintiffs' interpretation of the Twenty-first Amendment would render the three-tier system subject to "strict scrutiny" and almost certainly unconstitutional. The three-

tier system permits only in-state wholesalers to sell to in-state retailers. *See North Dakota*, 495 U.S. at 447 (Scalia, J., concurring in judgment). Under plaintiffs' novel and ahistorical "nondiscrimination" principle, this requirement would constitute facial discrimination. States would have to defend it under strict scrutiny, with the predictable result that the States would be required to allow any wholesaler anywhere to sell to in-state retailers.

Plaintiffs' principle would not stop there. Since Michigan allows in-state retailers to ship alcohol directly to in-state consumers, *see* Mich. Comp. Laws § 436.1203, plaintiffs' nondiscrimination principle would require Michigan to allow out-of-state retailers to ship alcohol directly to the State's consumers, or face strict scrutiny for not doing so. Even a State that barred all direct shipping would be open to the charge of discrimination, since only in-state retailers could sell directly to consumers. Such a State would have to defend its decision under heightened scrutiny, and plaintiffs' brief lays the groundwork for such a challenge, arguing that an in-state presence is not necessary for entities selling alcohol directly to consumers. *See, e.g.*, Br. 38 (minors "far more likely" to obtain alcohol illegally from in-state retailers than via direct shipping); Br. 41 (Michigan can protect tax revenues via permit system for direct shippers). Such a challenge would include all forms of alcohol sold by in-state retailers, and thus would open up the States to shipments of beer and spirits as well.

There is no stopping point short of the destruction of the three-tier system. Plaintiffs' principle would usher in an unrestricted national market in mail-order beverage alcohol—something that would shock the legislators who drafted the Amendment, who thought they had ensured that States would never again be powerless, as they were after *Bowman* and *Rhodes*, to regulate the direct shipment of beverage alcohol to their residents.

CONCLUSION

The judgment of the United States Court of Appeals for the Sixth Circuit should be reversed.

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JUANITA SWEDENBURG, *et al.*,

Petitioners,

v.

EDWARD D. KELLY, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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In vino veritas.

– Pliny (A.D. 23-79)

ARGUMENT

I. NEW YORK'S DISCRIMINATORY AND PROTECTIONIST DIRECT SHIPPING BAN CONSTITUTES A *PER SE* VIOLATION OF THE COMMERCE CLAUSE.

Implicitly confessing a Commerce Clause violation, respondents and their *amici* state that this case would be different if it involved a commodity other than alcohol. In fact, this case is before the Court because it does *not* involve alcohol generally, but wine specifically.

That is because a majority of states, including New York and Michigan, have chosen to regulate wine distinctively, with a significant majority now allowing some direct shipping of wine (but not other types of alcohol) directly to consumers. The reasons for allowing direct shipping of wine are numerous and varied. Unlike other types of alcohol, varieties are infinite and distinct, and direct shipping is necessary to facilitate consumer choice. Wine is now produced in all 50 states, many of which (including New York) wish to promote their local wine industries. Direct shipping of wine does not seriously implicate concerns about underage access. And some states view direct shipping as a means of generating tax revenues. *See* Federal Trade Comm'n, *Possible Anticompetitive Barriers to E-Commerce: Wine* (July 2003).

Among the majority of states that have chosen to treat wine distinctively for purposes of direct shipping, only a handful – including New York and Michigan – have chosen to discriminate, by freely allowing intrastate direct shipping while prohibiting it to out-of-state wineries. These

consolidated cases are not an attack on the three-tier system of alcohol distribution, which will remain intact regardless of the outcome of this lawsuit; nor do they seek unregulated traffic in wine. Rather, they seek only to confine the State to regulate the direct shipment of wine by one set of rules, not two.

A. Despite respondents' obfuscatory efforts, New York's direct shipment regulatory scheme blatantly discriminates.[1] No license is available for out-of-state wineries to ship directly to New York consumers (2d Cir. J.A. 306-46; *House of York v. Ring*, 322 F. Supp. 530, 533 (S.D.N.Y. 1970)).

The general counsel of the State Liquor Authority sets forth a cumbersome system by which out-of-state wineries theoretically may open a New York winery and warehouse, obtain a retailer license, and ship wine in vehicles owned by the winery or licensed by the State (2d Cir. J.A. 159-60).[2] The process is so convoluted that no winery ever has even attempted it (*id.* at 159). For the vast majority of wineries that are small, the burdens are Sisyphean. That is why this Court consistently has recognized that in-state

[1] For a thorough discussion of New York's regulatory scheme and its effects upon in-state and out-of-state wineries, *see* Amicus Br. of Millbrook Vineyards & Winery.

[2] The State, apparently disavowing the testimony of its own witness, here for the first time suggests that other alternatives may be available (State Br. at 8). This appears to be an 11th-hour conversion, for previously the State consistently informed out-of-state wineries that no options existed for direct shipping (2d Cir. J.A. 306-46). In any event, such theoretical assurances late in the appellate process are unconvincing. As this Court admonished in a similar context in *Brown-Forman Distillers Corp. v. N.Y. St. Liquor Auth.*, 476 U.S. 573, 583 n.5 (1986), "The protections afforded by the Commerce Clause cannot be made to depend on the good grace of a state agency."

business operations requirements constitute *per se* violations of the Commerce Clause. *See, e.g., Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970); *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963); *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951); *Ward v. Maryland*, 79 U.S. 418 (1870).

Even if a viable physical presence option existed, the playing field still is not level. The State (Br. at 39-40) tries to equate the various in-state direct shipping options. But as the chart at p. 28 of our opening brief illustrates, by far the easiest direct shipping opportunities (*e.g.*, no retailer license necessary, no second facility requirement, use of common carriers permissible) are limited on the face of the statutes to New York farm wineries (ABC Law §76-a(6)(d)), which are limited to New York wine products. Such a discriminatory system presents a classic *per se* Commerce Clause violation. "When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry." *Brown-Forman*, 476 U.S. at 579.

B. In *Healy v. The Beer Inst.*, 491 U.S. 324, 340-41 (1989), the Court reiterated its "consistent practice of striking down state statutes that clearly discriminate against interstate commerce (citations omitted), unless that discrimination is *demonstrably justified by a valid factor unrelated to economic protectionism*" (emphasis added). In *Bacchus Imports v. Dias*, 468 U.S. 263, 270 (1984), the Court ruled that a finding of economic protectionism "may be made on the basis of either discriminatory purpose, or discriminatory effect." Both are here in abundance.

Respondents ignore the extensive record evidence of protectionist intent in multiple contexts: when the legislature extinguished direct interstate shipping options in 1970; when the legislature enacted the farm winery exemption for the express benefit of New York wineries; and when the governor vetoed direct interstate shipping legislation in 1995. *See* Opening Br. 3-5. *See also* Amicus Br. of George A. Akerlof, *et al.*, in No. 02-1116 (brief of Nobel laureate economists); Riekhof and Sykuta, "Regulating Wine by Mail," *Regulation* 30, 36 (Fall 2004) (empirical study finding that "economic interests in both the private and public sectors are the principal drivers of restrictions on direct interstate shipping of wine"). Indeed, in the district court, the State's then-candid counsel acknowledged that the direct shipping exemptions for New York wineries were aimed at promoting the State's domestic wine industry (Pet. App. 54a-55a). As in *Bacchus*, the Court does not have to guess about the motives underlying New York's discriminatory direct shipping regime.

C. Independent of its facial discrimination, the law is discriminatory in effect. *See Brown-Forman*, 476 U.S. at 592 (Stevens, J., dissenting) ("there should be ample evidence available to a concerned litigant to prove that this consequence has in fact developed"). While nearly every New York winery avails itself of direct shipping (Jt. App. 42-43), only a fraction of the tens of thousands of out-of-state wine labels are available to New York consumers (Jt. App. 187-89; 2d Cir. J.A. 3547-50, 3554-55, 3578-82, 3595). On a national scale, the Federal Trade Commission has found that bans on direct shipping limit consumer choice and raise prices. *See* FTC Study, *supra*. *See also* Jt. App. 38-39, 186-87; 2d Cir. J.A. 3578; Amicus Br. of Goldwater Inst. in No. 03-1116 at 12. The bans also adversely

impact the cargo transport industry, which depends upon uniform rules for national commerce, *see* Amicus Br. of Amer. Cargo Ass'n in No. 03-1116; as well as the vast potential of the Internet to enhance consumer choices. *See* Amicus Br. of Amer. Homeowners Alliance, *et al.*, in No. 03-1116.

D. The State easily could satisfy legitimate regulatory interests by making them "licensed and accountable" by conditioning direct shipping upon a permit,[3] as other states successfully have done. Amicus Br. of Calif. *et al.* in No. 03-1116 at 19-20.[4] Not only do States now have authority under the 21st Amendment Enforcement Act, 27 U.S.C. §122a, to enforce in their home federal courts any violations of valid laws against out-of-state wineries, but the federal government has power to revoke a winery's license for violating state laws under the Federal Alcohol Administration Act, 27 U.S.C. §204(d). As a consequence, the FTC reports no enforcement problems in states that allow direct interstate shipping. *See* FTC Study at 26-39; *see also* Amicus Br. of Wine Institute in No. 03-1116 (outlining nondiscriminatory alternatives). Given that New York imposes *no* regulations on intrastate direct shipping and the legislative history in the record reveals few such

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[3] The New York State Liquor Authority already has authority to provide permits for entities not encompassed by the liquor statutes (ABC Laws §105-9; Pet. App. 98a).

[4] As those States also point out (Br. at 2-3 and 10-14), it is inconsistent for respondents to argue that the 21st Amendment allows the greater power of discrimination but not the lesser power of evenhanded taxation. Indeed, states have wide latitude for nondiscriminatory taxation under the 21st Amendment. *See Heublein, Inc. v. S.C. Tax Comm'n*, 409 U.S. 275 (1972). And, in fact, States that choose to do so successfully collect taxes on indirect wine shipments. *See, e.g.*, FTC Study at 38-40.

concerns, its post hoc rationalizations of its discriminatory regime ring hollow.

II. THE WILSON ACT, WEBB-KENYON ACT, 21st AMENDMENT, AND THIS COURT'S JURISPRUDENCE ALL EMBRACE THE PRINCIPLE OF NONDISCRIMINATION.

Instead of meeting their burden of demonstrating that the discriminatory regime is "demonstrably justified by a valid factor unrelated to economic protectionism," *Healy*, 491 U.S. at 341, respondents have chosen to ignore this Court's "wise reluctance to wade into the complex currents" underlying the enactment of the 21st Amendment. Cutting to the chase of their argument, New York dismisses *Bacchus* as an anomaly (State Br. at 28); while the liquor distributor respondents, along with Michigan and their state *amici*, candidly call on the Court to overturn it (Priv. Resp. Br. at 26 n. 8; Amicus Br. of Ohio, *et al.* in No. 03-1116 at 2; Mich. Br. in No. 03-1116 at 28). They press upon this Court an argument it has never accepted: that State authority under the 21st Amendment is plenary; or, as their state *amici* put it, that "the dormant Commerce Clause simply does not apply." Ohio Br. at 2.

Respondents' argument would sweep away not only *Bacchus*, but all of this Court's jurisprudence, beginning with *Hostetter v. Idelwild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964), that harmonizes the Commerce Clause and 21st Amendment. Nothing would be left of the Commerce Clause in this context were the State allowed to rationalize even nakedly protectionist legislation within the ambit of its 21st Amendment powers. And if the Commerce Clause is so devoid of vitality, from where does Congress derive its power to regulate alcohol, as this

Court has sustained it in such cases as *Calif. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) and *Capital Cities Cable v. Crisp*, 467 U.S. 691 (1984)?

In reality, no such evisceration of the Commerce Clause is manifest in either the 21st Amendment or the Webb-Kenyon Act. To prove otherwise, respondents face a high hurdle. "[B]ecause of the important role the Commerce Clause plays in protecting the free flow of interstate trade, this Court has exempted state statutes . . . only when the congressional direction to do so has been 'unmistakably clear'." *Maine v. Taylor*, 477 U.S. 131, 138-39 (1986); *accord*, *Wyoming v. Oklahoma*, 502 U.S. 458 (1992) ("Congress must manifest its unambiguous intent before a federal statute will be read to permit or to approve such a violation of the Commerce Clause"). A full contextual review of those enactments, buttressed by this Court's jurisprudence for the better part of two centuries, shows that far from unambiguously jettisoning the nondiscrimination principle at issue here, they fully embrace it.

A. Despite the twists and turns of jurisprudence and congressional enactments concerning alcohol over the past two centuries, two complimentary core principles have endured to this day: that State power is bounded by the police power and by the rule of nondiscrimination.

Early cases afforded states wide latitude to regulate or prohibit alcohol, provided the laws constituted "a legitimate exertion of the police powers." *Mugler v. Kansas*, 123 U.S. 623, 661 (1887); *accord*, *License Cases*, 46 U.S. 504, 582 (1847). The Court in *Tiernan v. Rinker*, 102 U.S. 123, 126 (1880), held that a license fee on alcohol is valid only if nondiscriminatory, observing that the object of

the Commerce Clause is "to insure this uniformity against discriminating State legislation."

Hence, in *Walling v. Michigan*, 116 U.S. 446, 460 (1886), a unanimous Supreme Court invalidated a discriminatory state tax imposed upon the privilege of selling alcohol. The State asserted such regulation was a permissible exercise of the police power, but the Court disagreed, declaring that "[t]his would be a perfect justification of the act if it did not discriminate against the citizens and products of other States." *Id.* at 460. In other words, the police power simply does not encompass the power to discriminate against interstate commerce.

Subsequent cases began to limit state authority over alcohol in interstate commerce, thereby conferring an advantage to interstate over intrastate commerce, leaving only the latter subject to regulation under the police power. In *Bowman v. Chic. & N.W. Railway Co.*, 125 U.S. 465 (1888), the Court struck down a dry state's prohibition of interstate transportation of alcohol, holding that absent express congressional authorization, such interstate commerce was immune from state regulation. Dissenting, Justice Harlan, citing *Walling*, argued that such regulation was valid so long as it did not discriminate against interstate commerce. *Id.* at 517-518 (Harlan, J., dissenting). In *Leisy v. Hardin*, 135 U.S. 100 (1890), the Court extended immunity to sales to residents in unopened packages. Justice Gray dissented, again distinguishing the case from *Walling* because the law treated interstate and intrastate commerce equally. *Id.* at 152 (Gray, J., dissenting).

Congress responded in 1890 by enacting the Wilson Act, which extinguished the immunity attaching to interstate

commerce. The debates focused on overturning *Bowman* and *Leisy*; no disapproval whatsoever was expressed of *Walling* or the nondiscrimination principle.[5] To the contrary, the law provided that

> [all] . . . intoxicating liquors . . . transported into any State or Territory . . . shall upon arrival . . . be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, *to the same extent and in the same manner as though such . . . liquors had been produced in such State or Territory*. . . .

27 U.S.C. §121 (emphasis added).

In so doing, Congress expressly preserved both the police power limitation, which precludes discrimination, and the nondiscrimination principle. Subsequent cases so held. In *In re Rahrer*, 140 U.S. 545, 554 (1891), the Court upheld the constitutionality of the Wilson Act, holding that state laws were valid where passed "legitimately for police purposes." In confronting *Bowman* and *Leisy*, the Court observed, "Congress has now spoken, and declared that imported liquors . . . shall, upon arrival in a State, fall within the category of domestic articles of a similar nature." *Id.* at 560. Even more to the point, the Court in *Scott v. Donald*, 165 U.S. 58 (1897), struck down a law that limited the sale of alcohol to in-state producers. Under the Wilson Act, the Court held, "equality or uniformity of treatment under state law was intended." *Id.* at

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[5] For two thorough treatments of the legislative history of the Wilson Act, the Webb-Kenyon Act, and the 21st Amendment, *see* Amicus Br. of DKT Liberty Project and Amicus Br. of Napa Valley Vintners, both in No. 03-1116.

100. In language directly on point to the present case, the Court declared that under a State's police power,

> a law may forbid entirely the manufacture and sale of intoxicating liquors and be valid. Or it may provide equal regulations for the inspection and sale of all domestic and imported liquors and be valid. But the State cannot, under the Congressional legislation referred to, establish a system which, in effect, discriminates between interstate and domestic commerce. . . .

Id.

The Court proceeded to strike down a pair of laws forbidding direct interstate shipments of wine for personal use, holding they were an invalid regulation of interstate commerce. *Rhodes v. Iowa*, 170 U.S. 412 (1898); *Vance v. W.A. Vandercook Co.*, 170 U.S. 438 (1898). Dissenting and citing *Scott* approvingly, Justice Gray admonished that such regulations were within the States' police power so long as they did not discriminate against interstate commerce. *Rhodes*, 170 U.S. at 431-35 (Gray, J., dissenting).

Congress acted to remove the immunity "in certain cases," enacting the Webb-Kenyon Act, 27 U.S.C. §122, which overturned *Rhodes* and *Vandercook*. Again, the legislative history is bereft of any intent to disturb the venerable nondiscrimination principle.[6] In sustaining the

[6] Construing the Webb-Kenyon Act not to shield a discriminatory liquor purchase law, the South Carolina Supreme Court applied *Scott* in holding that the act eliminated immunity "of only valid state laws. It was not intended to confer and did not confer upon any state the power to make injurious discriminations against the products of other States."

(Continued on following page)

act's constitutionality, the Court in *Clark Distilling Co. v. Western Md. Railway Co.*, 242 U.S. 311, 318 (1917), applied the act to sustain a nonimportation law that forbade "all shipments . . . whether from within or without the State." The Court explained that Webb-Kenyon "was enacted simply to extend that which was done by the Wilson Act," *i.e.*, to "prevent the immunity characteristic of interstate commerce" from affording "a means by subterfuge and indirection" to thwart valid State laws. *Id.* at 324. Thus the Wilson and Webb-Kenyon Acts established the dual cornerstones of state regulation that persist to this day: broad State authority to regulate alcohol pursuant to its police powers and subject to the rule of nondiscrimination.

Passage of the 18th Amendment nationalized what previously was primarily a state issue. Though the legislative history of the 21st Amendment is often contradictory, two points are beyond dispute: (1) nowhere does it disturb the continuing vitality of cases like *Walling* and *Scott* or the nondiscrimination principle they embody; and (2) the 21st Amendment embraced and constitutionalized the Wilson and Webb-Kenyon Acts, and restored the status quo ante.[7] *Craig v. Boren*, 429 U.S. 190, 205 (1976). For good measure, Congress subsequently re-enacted the

Brennan v. So. Express Co., 90 S.E. 402, 404 (S.C. 1916). Respondents cite no cases to the contrary.

[7] *See* DKT Liberty Amicus Br. at 21-29; Napa Valley Vintners Amicus Br. at 18-26. As those briefs demonstrate, the rejection of the proposed §3 of the amendment, pertaining to concurrent federal authority to regulate saloons, did not indicate congressional intent to divest itself of regulatory authority over alcohol, but rather to preserve traditional State authority over saloons.

Webb-Kenyon Act because its constitutionality, absent congressional re-authorization, was in dispute.

Applying the newly enacted amendment in *State Board of Equalization of California v. Young's Market Co.*, 299 U.S. 59, 61 (1936), the Court upheld a license fee for alcohol importation that was "the same whether the beer to be sold is imported or domestic."[8] The Court emphasized the narrowness of its decision, observing that the plaintiffs contended that to sustain the license fee would require construing the 21st Amendment as having "freed the States from all restrictions upon the police power to be found in other provisions of the Constitution. The question for decision requires no such generalization." *Id.* at 64.

Purporting to apply *Young's Market*, the Court upheld discriminatory legislation with cursory analysis in a trio of cases in 1938-39. *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401 (1938); *Indianapolis Brewing Co. v. Liquor Control Comm'n*, 305 U.S. 391 (1939); *Joseph F. Finch & Co. v. McKittrick*, 305 U.S. 395 (1939). Indeed, the Court went so far as to hold in *Indianapolis Brewing*, 305 U.S. at 394, that a State's 21st Amendment powers are unbounded even by the Equal Protection Clause – a proposition that subsequently has been completely repudiated. *See Craig v. Boren*, *supra*; *accord Midcal*, 445 U.S. at 108.

But the Court immediately returned to an approach that balanced competing constitutional interests. In *William Jameson & Co. v. Morgenthau*, 307 U.S. 171 (1939), the Court rejected a challenge to the labeling provisions of the federal Alcohol Administration Act,

[8] Indeed, the Court observed that in-state brewers actually were charged a higher fee. *Id.* at 64.

expressly disavowing the plenary authority argument respondents press here. The law was attacked on the ground that the 21st Amendment "gives to the States complete and exclusive control over commerce in intoxicating liquors. . . . We see no substance in this contention." *Id.* at 173. And in sustaining a state law that channeled alcohol traffic through prescribed mechanisms, the Court in *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138 (1939), emphasized the state's "police authority" to adopt "reasonably appropriate" alcohol regulations, noting that the state law at issue "creates no discrimination against interstate commerce. It is subjected to the same regulations as those applicable to intrastate commerce." *Id.* at 140.

Hence, when the Court in *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 329 (1964), faced the question whether, as respondents here assert, the 21st Amendment "obliterates" the Commerce Clause, it construed narrowly its prior rulings and soundly rejected the notion. To this "absurd oversimplification," the Court observed that if "the Commerce Clause had been *pro tanto* 'repealed,' then Congress would be left with no regulatory power over interstate or foreign commerce in intoxicating liquor. Such a conclusion would be patently bizarre and is demonstrably incorrect." *Id.* at 332. Instead, the Court admonished, "[B]oth the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. . . . [E]ach must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case." *Id.*

Thus in *Midcal*, 445 U.S. at 106, which pitted the exercise of congressional authority under the Commerce Clause against a State's 21st Amendment core power, a unanimous Court ruled that the "national policy in favor of

competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement." In *Capital Cities*, 467 U.S. at 713-714, the Court likewise balanced federal Commerce Clause powers against 21st Amendment interests, striking down a state alcohol advertising regulation.

It is within this solid tradition that *Bacchus* fits.[9] The proper approach under *Bacchus* and this Court's other 21st Amendment cases, therefore, is to query whether in a particular case "the principles underlying the Twenty-first Amendment are sufficiently implicated . . . to outweigh the Commerce Clause principles that would otherwise be offended," 468 U.S. at 275; and to eschew economic protectionism, *id.* at 276, and the discrimination that renders it apparent. *Id.* at 270. *Bacchus* thus endorsed and reaffirmed the same nondiscrimination principle that this Court had applied for nearly all of the previous century.

The Court applied *Bacchus* in *Brown-Forman*, 476 U.S. at 585, holding that a price affirmation statute, defended as an exercise of the State's core 21st Amendment powers, "on its face violates the Commerce Clause, and is not a valid exercise of New York's powers under the Twenty-first Amendment." In *Healy*, 491 U.S. at 339-340, the Court likewise struck down a price affirmation statute under the Commerce Clause both because of its extraterritorial effect *and* because it was discriminatory. Though the State had a legitimate interest in securing lower prices, the Court held that that policy "is not advanced by . . . exempting brewers and shippers engaging in solely domestic sales." *Id.* at 341;

[9] This Court subsequently affirmed that *Bacchus* did not change that law but rather "applie[d] legal rules already decided" in holding that it should have retroactive effect. *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 534 (1991) (Opinion of Souter, J.).

see also id. at 344 (Scalia, J., concurring) (the statute's invalidity "is fully established by its facial discrimination against interstate commerce . . . and by [the State's] inability to establish that the law's asserted goal of lower consumer prices cannot be achieved in a nondiscriminatory manner").

Finally, if Congress or this Court has conferred power upon States to discriminate, one entity to which that clearly would come as a surprise is Congress. In enacting the 21st Amendment Enforcement Act, 27 U.S.C. §122a, to answer the states' call for additional regulatory authority to police interstate commerce over alcohol, Congress in subsection (e) expressly limited such authority to "a valid exercise of power" under the 21st Amendment as it "is interpreted by the Supreme Court . . . including interpretations in conjunction with other provisions of the Constitution." 27 U.S.C. §122a(e). Legislative history makes clear that the law's framers understood the applicable provisions to include the dormant Commerce Clause and its rule of nondiscrimination as applied by *Bacchus*. *See, e.g.*, 146 Cong. Rec. S10197 (daily ed. Oct. 11, 2000) (Statement of Sen. Hatch) ("this bill does not, even unintentionally, somehow change the balancing test employed by the Courts in reviewing State liquor laws); 106 Cong. Rec. S10214-15 (daily ed. Oct. 11, 2000) (Statement of Sen. Feinstein) (applying *Hostetter* and *Bacchus* to the effect that "the 21st Amendment cannot be used by the States to justify liquor laws which, by favoring instate businesses, discriminate against out-of-state sellers"). *See also* Amicus Br. of Members of the U.S. Congress in No. 03-1116 at 20-21.

In sum, the principle of nondiscrimination is deeply embedded in the common law notion of police power, in

over 150 years of jurisprudence, and in the affirmative exercise of congressional power under the Commerce Clause. The Court should continue to honor that principle here.

III. A DECISION ALLOWING DISCRIMINATION WOULD COLLIDE WITH OTHER CONSTITUTIONAL GUARANTEES.

All parties agree that whatever its effect on the Commerce Clause, the 21st Amendment leaves intact all other constitutional guarantees. Rather than answer the argument, respondents urge the Court to ignore other constitutional provisions, especially the privileges and immunities clause, that plainly would proscribe discriminatory treatment against out-of-state entrepreneurs. *See* Amicus Br. of Va. Wineries Ass'n.

In fact, the Court has considered the Commerce Clause in construing the Privileges and Immunities Clause even where it was not raised in a case. *See, e.g., Hicklin v. Orbeck*, 437 U.S. 518, 531-32 (1978). That makes abundant sense given that a number of constitutional guarantees, including the Commerce Clause, Privileges and Immunities Clause, and Equal Protection Clause, all "are united by a common theme and focused on a single underlying evil: the distribution of resources or opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they want." Sunstein, "Naked Preferences and the Constitution," 84 *Colum. L. Rev.* 1689, 1689 (1984); *see also id.* at 1709 ("The basic themes of the [Privileges and Immunities Clause] are almost identical to those of the dormant commerce clause").

Likewise, the Court would do well to take account of the nondiscrimination command of the Privileges and Immunities Clause in construing the proper lines of demarcation between the Commerce Clause and the 21st Amendment. In so doing it will find further imperative for preserving and applying here the principle of nondiscrimination.

IV. THE PROPER REMEDY IS TO EXTEND REGULATED DIRECT SHIPPING ON NONDISCRIMINATORY TERMS.

The district court fashioned the appropriate remedy, opening direct shipping to out-of-state wineries on the same terms and conditions as in-state wineries (Pet. App. 72a-73a). The liquor distributor respondents argue instead that the Court should strike provisions that make in-state shipping lawful.[10] Such a remedy would be a jackpot for the liquor distributors: even in losing their case, their oligopoly over alcohol distribution would be made absolute, a perverse result in a case that seeks to vindicate consumer freedom and eradicate economic protectionism.

The question of remedy, however, is not before the Court. The Court granted review only on the threshold merits question of whether a State's discriminatory treatment of direct shipment of wine violates the Commerce

[10] That the farm winery exemption has a severance clause is of no moment: either remedy requires the Court to sever something, either the challenged exclusion of interstate shipping or the in-state exemptions. The New York ABC laws are so riddled with favoritism for New York wineries that finding and severing them all would require an exacting search.

Clause. Hence, the issue has not been fully briefed before this Court.

In any event, such a remedy also would violate the general principle that where a provision is unconstitutional because its benefits are under-inclusive, "extension, rather than nullification, is the proper course." *Califano v. Wescott*, 443 U.S. 76, 89-90 (1979); *see also Kassel v. Consolidated Freightways*, 450 U.S. 662 (1982) (in Commerce Clause challenge to limit on truck size that included intrastate exemptions, proper remedy was to strike ban).

An equally compelling reason to avoid the liquor distributors' proposed remedy is that it would create, by judicial fiat, a new crime, given that violation of the ABC laws comprises a criminal misdemeanor. The scores of New York wineries who today lawfully ship directly to consumers would be committing a criminal offense. Courts should not choose a remedy whose effect is to transform an act made lawful by the legislature into a criminal act,[11] for "the discretion to . . . define criminal offenses and prescribe punishments, resides wholly with state legislatures." *Schall v. Martin*, 467 U.S. 253, 268 n.18 (1984). *Accord*, *United States v. Bajakajian*, 524 U.S. 321, 336 (1998) (judgments about defining criminal offenses and punishments belong to the legislature); *Bousely v. United States*, 523 U.S. 614, 621 (1998) (only the legislature, not the courts, can make conduct criminal); *Hutto v. Davis*,

[11] Indeed, in 1995, the Legislature overwhelmingly approved direct interstate shipping legislation, only to have it vetoed by the governor (2d Cir. J.A. 442-444, 450-52). Such action, along with its creation of in-state direct shipping, evidences a clear legislative preference for inclusion, rather than for extinguishing a vital economic opportunity for New York wineries.

454 U.S. 370, 371 (1982) (defining what conduct constitutes a crime is a basic line-drawing process within the province of the legislature, not the courts). The proper remedy is to extend the direct shipping opportunity on equal terms, precisely as the district court did.

CONCLUSION

On multiple occasions over the past 40 years, this Court has rejected State efforts to invoke the 21st Amendment to cleanse their constitutional sins. New York here persists in arguments it has made repeatedly over that same period to shield economic protectionism from constitutional scrutiny. *See Hostetter*, *supra*; *Brown-Forman*, *supra*; *Loretto Winery, Ltd. v. Gazzara*, 601 F. Supp. 850 (S.D.N.Y.), *aff'd sub nom.*, *Loretto Winery, Ltd. v. Duffy*, 761 F.2d 140 (2d Cir. 1985) (striking down discriminatory statute authorizing sale of certain domestic alcohol in grocery stores). The holding in those cases should be the same here: the 21st Amendment, broad though the powers it confers upon states may be, provides no sanctuary for economic protectionism.

Respectfully submitted,

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IN THE

Supreme Court of the United States

JENNIFER M. GRANHOLM,
Petitioner,

v.

ELEANOR HEALD, *et al.*,
Respondents.

MICHIGAN BEER & WINE WHOLESALERS ASSOCIATION,
Petitioner,

v.

ELEANOR HEALD, *et al.*,
Respondents.

On Writ of Certiorari the United States Court of Appeals for the Sixth Circuit

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BRIEF OF GEORGE A. AKERLOF, DANIEL L. MCFADDEN, VERNON L. SMITH, DONALD J. BOUDREAUX, ROBERT W. HAHN, JOHN M. LETICHE, AND ROBERT E. LITAN AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS ELEANOR HEALD *ET AL.*

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QUESTION PRESENTED

Does a State's regulatory scheme that permits in-state wineries directly to ship alcohol to consumers but restricts the ability of out-of-state wineries to do so violate the dormant Commerce Clause in light of Sec. 2 of the Twenty-first Amendment?

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INTEREST OF AMICI CURIAE

This *amicus curiae* brief is submitted by a group of economists in support of respondents Eleanor Heald *et al.* (cases 03-1116 and 03-1120). The individual signatories on this brief are leading economics scholars whose contributions to the study of consumer markets have enjoyed national and international recognition and acclaim.

George A. Akerlof is Professor of Economics at the University of California at Berkeley and 2001 Nobel Laureate in Economics.

Daniel L. McFadden is Professor of Economics at the University of California at Berkeley and 2000 Nobel Laureate in Economics.

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Robert W. Hahn is Executive Director of the AEI-Brookings Joint Center for Regulatory Studies.

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Robert E. Litan is Director of the AEI-Brookings Joint Center for Regulatory Studies.

The economists were assembled by the Henry Wine Group, a for-profit corporation domiciled in California.[1] The Henry Wine Group is the largest importer, distributor, and broker in the United States dealing exclusively in fine wines. The firm's business model, which emphasizes quality services to suppliers

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[1] No party authored this brief in whole or in part, and no person except amicus Henry Wine Group made a monetary contribution to the preparation and submission of this brief. See S. Ct. R. 37.6.

and customers, rests on the recognition that the special needs of fine wine suppliers and their customers are not being met by the dominant, spirits-driven wholesale distributors. Protectionist state regulations constitute a significant obstacle to the Henry Wine Group's growth and market penetration outside California.

For many years, the company's leading officers have played an active role in a national campaign against antiquated and inefficient wine marketing restrictions. In their experience, economic considerations and, in particular, the consumer benefits that would likely flow from a more open wine market have often received too little recognition in a debate where regulatory concerns, interest group politics, and weighty constitutional questions all intersect. Accordingly, the Henry Wine Group asked the signatories to provide a fuller picture of the wine market and its regulatory environment, which may be powerfully affected by these cases. We claim no constitutional expertise, and we submit this brief entirely in our capacity as economists and on the economic background and implications of the direct shipment regulations here at issue. All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

Throughout the United States, wine is commonly sold under a "three-tier" system: producer to wholesaler to retailer. Most states prohibit vertical integration between the tiers, and most protect the three-tier system through a variety of regulatory means. Among the most common restrictions are limitations or outright bans on direct sales from producers to consumers.

Direct shipping restrictions, and especially bans on direct interstate shipments, are measures of a type that quite likely would inflict welfare losses on consumers and on many wine producers, especially smaller market participants. If existing

state restrictions on direct interstate shipments were removed, there would be more competition, which would have a positive impact on consumer and social welfare (that is, the total surplus of consumers and producers).

As we read the briefs submitted by the state parties and their *amici* in these cases, they do not seriously contest either the economic costs of the regulatory regime nor, by implication, the potential benefits of a national wine market that is free from protectionist inhibitions. Rather, they contend that the existing restrictions are justified by other state interests, such as the promotion of temperance, the protection of minors, tax collection considerations, and the maintenance of orderly market conditions. These concerns, however, cannot justify the *discriminatory* laws at issue in these cases. More broadly, the history and the contours of state restrictions on direct shipments, as well as the empirical evidence from state markets that lack those restrictions, indicate that the proffered public-interest justifications are not persuasive. The available evidence supports the economists' expectation that restrictions on market entry often serve to protect highly organized and entrenched interest groups, to the detriment of consumer welfare.

To repeat, we neither possess nor claim expertise on the true scope of the Twenty-first Amendment. With that caveat, we argue that the principles of open state borders and non-discrimination, as they have been explicated in this Court's decisions under the Commerce Clause, are consistent with the economic profession's well-accepted views on the benefits of free trade and competitive markets. Those views support the invalidation of the discriminatory state regulations at issue in these cases.

I. DIRECT SHIPPING RESTRICTIONS DIMINISH CONSUMER AND ECONOMIC WELFARE

The U.S. wine market has been subject to relatively little systematic empirical or econometric analysis. That is unfortunate (for the purposes of these cases) but hardly surprising. Some markets—such as network industries, natural monopolies, or industries with declining marginal costs—cause a great deal of disagreement among economists. The wine market, in contrast, is a classic, competitive market, albeit a heavily regulated one. The dynamics of such markets and the consequences of regulatory interventions have been well-understood for many decades. The application of that expert consensus to the wine market and its regulatory context is straightforward.

A. State-Imposed Direct Shipping Restrictions Constitute a Significant Regulatory Barrier to an Efficient National Wine Market

Over the past 25 years, the United States wine market has undergone dramatic changes at the production stage, in the distribution process, and at the demand level. The present market conditions, insofar as they pertain to state-imposed direct shipping restrictions, are summarized with admirable clarity in a study by the staff of the Federal Trade Commission. Report from the Staff of the Federal Trade Commission, *Possible Anticompetitive Barriers to E-Commerce: Wine* (July 2003) *available at* http://www.ftc.gov/os/2003/07/winreport2.pdf (hereinafter FTC Report). The fact that petitioners and their *amici* do not bother to discuss the findings of the FTC Report provides further evidence of the soundness of the FTC staff's analysis.

The wine industry has been characterized both by a remarkably high degree of market entry on the part of wineries and by increased concentration on the part of distributors. "[A]s demand has increased for individualistic, hand-crafted wines,

the number of wineries has grown dramatically, from between 500–800 in 1975 to well over 2,000 today." FTC Report at 6 (footnote citing estimates omitted). At the same time, concentration in the market for mass-marketed wines has increased. Thirty U.S. wine companies supply over 90 percent of U.S. production, and the top three firms account for 60 percent of volume. Gina M. Riekhof & Michael E. Sykuta, *Politics, Economics, and the Regulation of Direct Interstate Shipping in the Wine Industry*, CORI Working Paper 03-04 at 7 (citing estimates and sources) *available at* http://ssrn.com/abstract=481947 (hereinafter Riekhof & Sykuta). The distributor industry has experienced rapid concentration. Market participation has dropped from several thousand in the 1950s to a few hundred today. In some regions, the distributor market may be approaching near-monopolistic conditions, although systematic data appear to be unavailable. FTC Report at 6.

Clearly, state regulatory interventions impede competition at the wholesale level. Many states have enacted laws that grant wholesalers preferential contract rights, establish exclusive territorial arrangements between wholesalers and wineries,[2] and deter price cutting. The FTC has been sharply critical of some of these measures and their anti-competitive effects. FTC Report at 6–7 (listing examples). There is also some evidence that market concentration has increased at the retail level. Riekhof & Sykuta at 9–10.

At the consumer level, the demand for high-end wines—a luxury good—has increased with the general rise in prosperity.

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[2] Such arrangements are not necessarily anti-competitive. In some situations, they may well lower price and improve quality. However, in combination with other government interventions (such as laws that make it difficult for suppliers to terminate contracts with distributors), state-protected exclusive territories tend to produce anti-competitive outcomes. Douglas Glen Whitman, *Strange Brew: Alcohol and Government Monopoly* 27–28 (2003).

This group of consumers is largely composed of the wealthiest members of our society. The Wine Spectator—the most widely circulated magazine devoted exclusively to wines—counts upwards of 1.1 million readers, with a median household income of $144,500. Wine Spectator Advertising Information 3 (2003) *available at* http://www.winespectator.com/Wine/Images/Graphics/ads/WS_NAT_EKIT.pdf (hereinafter Wine Spectator). This segment of the overall wine-consuming populace appears to have grown rapidly and substantially over the past decade. For example, the Wine Spectator's paid circulation has increased from roughly 150,000 in 1994 to nearly 375,000 in 2003. Wine Spectator at 8. At the same time, the emergence of the Internet as a distribution channel has, in the states where direct purchases are permitted, substantially increased consumer access to rare high-end wines. Direct shipments are estimated at over $500 million, or 3% of the wine market. FTC Report at 5 (citing estimates).

In this changed market environment, the shrinking distributor network has resulted in a bottleneck. And market participants, not surprisingly, have attempted to bypass this bottleneck. Large wineries have created their own distribution systems, where that is permitted by law. Small wineries, for their part, have sought to avail themselves of direct-sales opportunities. Those firms, often producing no more than two or three-thousand cases per year, cannot supply the volume required for mass distribution. For distributors, carrying small-volume wines entails high transaction costs. Distributors are typically responsible for promotional activities, such as wine tastings. Small-scale sales do not warrant such expenditures. As a result, "only the 50 to 100 largest wineries are able to secure widespread representation in distribution networks." Alan E. Wiseman & Jerry Ellig, *Market and Nonmarket Barriers to Internet Wine Sales: The Case of Virginia*, 6:2 Business and Politics at 5 (2004) *available at* http://www.bepress.com/bap/vol6/iss2/art4 (hereinafter Virginia

Study). Small wineries typically use direct shipments as their primary means of accessing the national market. E-commerce has rendered such sales viable, but regulatory prohibitions on direct shipments in many states bar mutually beneficial transactions among small wineries and their consumers.

We know of no systematic effort to quantify the welfare effects of the existing direct shipment restrictions. Highly illustrative evidence, however, comes from the Virginia Study, the only available empirical comparison of the online and off-line wine markets. The study was conducted in 2002 in the area of McLean, Virginia, when Virginia administered a ban on direct interstate shipments (since lifted). The authors compared online prices and availability of 83 popular wines, identified through a poll that incorporates consumer preferences, with off-line prices and availability in the McLean area. Availability was unambiguously higher online. Even among the most popular twenty wines, eight were unavailable in the McLean area. Price comparisons, predictably, varied greatly with purchase quantity, the price level of wines, and delivery method for online purchases. Since transportation costs do not change with the price of wine, and since transportation costs constitute a larger proportion of total cost for low-volume shipments, online purchases are not a winning proposition for the connoisseur's sampling purposes (let alone a teenager's instant gratification). Unsurprisingly, though, the Virginia Study found substantial price advantages for online, by-the-case purchases of high-end wines. Direct shipment, in other words, generates economic benefits for the customer base that matches the Wine Spectator's readership, more than two-thirds of which report by-the-case wine purchases. Wine Spectator at 6.

The magnitude of the welfare losses that attend to direct shipping restrictions cannot be estimated with any confidence. Virginia Study at 20 n.38 (noting that a comprehensive welfare analysis would require additional, currently unavailable data). It is clear, however, that there exists a robust demand for online

wine purchases and a producer and distribution base to serve that demand. One cannot reasonably contest the FTC staff's conclusion that "[s]tate bans on interstate direct shipping of wine represent the single largest regulatory barrier to expanded e-commerce in wine." FTC Report at 3.

B. The Demise of Direct Shipping Restrictions Would Yield Economic Benefits

These cases do not challenge direct shipping restrictions per se. They challenge only *discriminatory* barriers to direct wine shipments. If those barriers were invalidated (as we urge the Court to do), Michigan and other states would remain free to erect those same barriers on a non-discriminatory basis. *Beskind v. Easley*, 325 F.3d 506, 518–519 (4th Cir. 2003). That lawful policy choice, however, would be bad economic policy.

The petitioners and their *amici* defend direct shipment restrictions on wine as an urgent exercise of the states' police powers and their interests in encouraging temperance, fighting teenage drinking, and ensuring tax collection. We do not dispute the legitimacy of those objectives. As economists, however, we are trained to demand evidence, and, moreover to weigh all of the costs and benefits of a particular public policy. On both counts, the petitioners' policy positions and assertions are unpersuasive.

The FTC Report provides no reason to believe that the demise of direct shipping restrictions would lead to the dire consequences predicted by the petitioners and their *amici*. The FTC staff conducted an extensive review of the experience in states that already permit direct interstate shipment of wine. Surveyed state officials reported "that they have experienced few, if any, problems with interstate direct shipment of wine to minors." FTC Report at 31. That observation is consistent with the economic evidence that Internet purchases of wine are an

uneconomical and therefore unlikely proposition for teenagers. Similarly, many states have adopted less restrictive means than an outright prohibition on direct interstate shipments, and those states report "few, if any" problems with tax collection. *Id.* at 38. The permit systems administered by many states appear to be a viable means of ensuring tax collection. *Id.* at 38–40. In that light, it is not surprising that the great majority of lower courts have concluded that states have less restrictive means than a ban on direct interstate shipments to enforce legitimate state objectives. *Id.* at 27–29 (summarizing cases).

Similarly, the state's *amici* have warned that the invalidation of Michigan's laws would spell the collapse of the three-tier system not only for wine but also for beer and liquor. *See, e.g.*, Brief of National Beer Wholesalers Association in Support of Petitioners at 4 (Sixth Circuit decision in this case "toppled a comprehensive three-tier system governing the distribution of intoxicating liquor"). That contention grossly exaggerates the likely consequences on the distribution system and, moreover, ignores the economic benefits of broader market access. The invalidation of direct shipping restrictions would favorably affect the availability and, most likely, the price of many wines. Both effects would enhance consumer welfare. The likely effects on industry structure and in particular the three-tier system are indeterminate, as they will depend on market participants' responses and on regulatory interventions. The most likely effect, however, is a more efficient distribution system.

> ***(i) Availability.*** A key effect of direct shipping restrictions is not to reduce the aggregate supply of wine (adults can buy all the wine they want) but rather to compress the range of choice. Inventory costs and diseconomies of scale prevent wholesalers and retailers from offering anything remotely comparable to the breadth of choice of

wines and vintages offered by producers. Due to economic necessity, the distribution network limits the choice to a relative handful of well-known brands. A reasonable estimate of the welfare losses associated with the unavailability of many wines would require systematic information on elasticities and product substitution in this market. We do not possess such information. Elementary economic reasoning and casual empirical information, however, suggest that those losses very likely could be significant.

As noted earlier, the principal purchasers of direct shipment are frequent consumers of high-end wines, who purchase the goods for future rather than immediate consumption. The revealed preferences of these consumers indicate that they view limited selection as anything but trivial. They would not subscribe to expensive magazines, let alone devote time to reading them, if they were indifferent between one Chardonnay and the next. Wholly apart from price effects and even quality, supply diversification itself has sizeable benefits for consumers who want to stock a respectable wine cellar (much as liquid and diversified equity markets benefit financial investors). Moreover, these consumers confront very high opportunity costs in the form of lost income or foregone leisure time. These costs mount as consumers spend time in traffic on the way to distant specialty retail stores, instead of selecting and purchasing wines—from a much greater variety—on the Internet. Needless to say, nothing in economic theory commands special preference for rich, time-pressed consumers. But nothing, either, warrants a dismissal of the welfare losses that occur as a result

of anti-competitive regulation whose effects are especially felt in this segment of the populace.

The demise of direct shipping regulations would necessarily expand selection and availability, as no regional retail market (let alone an individual retailer) can possibly offer the variety that is available on the Internet. However, market participants will not remain idle when confronted with increased competition. Broader availability of wines through direct shipping will likely increase selection at the retail level (certainly among local specialty retailers, if not necessarily within individual sales locations). Retail demand, in turn, may well prompt efforts at the distributor level to supply a greater variety of wines.

(ii) Price. While the likely price effects of a demise of direct shipping restrictions for wine are more conjectural than the predictable and unambiguously salutary effects on selection, general economic evidence strongly suggests that the elimination of artificial barriers to market entry should reduce prices. Economic models show conflicting results with respect to the price effects of Internet sales. Virginia Study at 9–11; FTC Report at 16–17 and sources cited *id.* n.75. The Virginia Study, as noted, showed substantial price advantages for by-the-case purchases of high-end wines over the Internet. As the authors observe, the static design of that study—conducted in a jurisdiction where direct shipments were prohibited at the time—permits no inference concerning the price effects (let alone the welfare effects) under competitive conditions. Virginia Study at 29. Still, the evidence of that study is consistent with the economists' ordinary

expectations about the price effects of broader competition: prices should generally drop, though not necessarily for all wines. That expectation is further buttressed by considerations of political economy, more fully discussed below. The fact that the three-tier system enjoys government protection in many states suggests that those protections generate surplus profits, which are likely to accrue to distributors in the form of economic rents and to consumers in the form of higher prices. The demise of direct shipping prohibitions would—in the absence of other government barriers to broader market entry—erode those rents and redound to consumers' benefit. FTC Report at 23.

(iii) Market Structure. The state defendants and their *amici* in these cases—in particular, wholesalers—have intimated that the invalidation of discriminatory direct shipping regulations would spell the demise of the three-tiered system. Brief for the Wine and Spirits Wholesalers of America in Support of Petitioners at 4, 24. In contrast, those same interests have described the existing, mandatory three-tier system as efficient. C. Boyden Gray, *Written Statement on Behalf of Wine and Spirits Wholesalers of America* at 2 (2002) *available at* http://www.ftc.gov/opp/ecommerce/anticompetitive/panel/gray.pdf.; FTC Report at 22 (citing additional sources). These positions are inconsistent.

A three-tier market structure is efficient in many settings. That is why it exists in many unregulated commodity markets, and why it continues to exist with respect to wine sales in states that do not

mandate a three-tier structure (such as California) or that permit direct sales subject to some restrictions (such as Illinois). Daniel L. McFadden, *Interstate Wine Shipments and E-Commerce* at 3 (2002) *available at* http://www.ftc.gov/opp/ecommerce/anticompetitive/panels/mcfadden.pdf (hereinafter McFadden). Specialization, efficiencies of scale, and other considerations often justify "middlemen" and their mark-ups.

What is at stake, however, is not the three-tiered system per se but rather the governmental imposition and protection of that system. The fact that many wine market participants have attempted to bypass the distributor bottleneck at both ends shows that a three-tiered system—especially where it is artificially imposed—is inefficient for those firms. For example, Australia's Foster's Brewing Company in 2001 acquired Beringer's, a large California winery, to leverage Beringer's distribution system for Foster's U.S. market expansion. Other market participants, including *amicus* Henry Wine Group, have consolidated portfolios of smaller wineries to build distribution capacity. Such vertical integration and acquisitions indicate that the costs of equivalent market access through arms-length market transactions must be quite high. Riekhof & Sykuta at 10; Ronald H. Coase, *The Nature of the Firm*, 4 Economica 386 (1937). Similarly, small wineries, in concert with consumer groups and non-profit law firms, have waged a long and determined campaign against wine marketing restrictions. Such investments suggest that the gains from reducing barriers to entry very likely could be sizable.

No one can confidently predict the market structure consequences of deregulating the wine market—any more than the economists who predicted substantial consumer gains from airline deregulation could predict the market structure that would emerge (*see, e.g.*, Michael E. Levine, *Is Regulation Necessary? California Air Transportation and National Regulatory Policy*, 74 Yale L. J. 1416 (1965)). For reasons mentioned, however, the demise of state protections of the three-tiered system will very likely generate greater diversity of distribution arrangements. A three-tiered system would survive where it generates efficiencies and suffer profit erosion where it fails to adjust to changed market conditions.

Such erosion of profits, however, by no means spells the demise of a three-tiered system. Amicus Daniel L. McFadden, one of the nation's leading experts on consumer markets (and an owner of a small winery), has argued that the distributors' investments in protecting their turf are disproportionate to the consumer benefits that would flow from a demise of artificial government protections of a three-tiered system. One reason why that might be so is that the broader availability of individualistic wines would tend to sharpen consumer awareness and appreciation. McFadden at 3. This analysis is consistent with the prediction that the demise of direct shipping restrictions will principally affect the selection rather than the price of wines. Put differently, expanding markets are not a zero-sum game.

One likely and salutary effect would occur "upstream," in wine production. Since one does not normally observe rapid market entry and increased

market concentration at the same time, one can infer that the existing distribution bottleneck substantially contributes to the bifurcation of the market into large and increasingly concentrated producers at one end and small wineries that cater to tourists and Internet purchasers at the other end. Dale M. & Philip L. Martin, *Inside the Bottle: The Wine Business*, Choices 30, 33 (Fall 2002). A more flexible distribution system would likely contribute to a market structure that more accurately reflects market forces and efficiencies.

II. DISCRIMINATORY DIRECT SHIPPING RESTRICTIONS ERECT PROTECTIONIST BARRIERS THAT LACK A PLAUSIBLE JUSTIFICATION

A. The Nondiscrimination Principle of the dormant Commerce Clause Serves Compelling Economic Purposes

As noted, the petitioners and their *amici* fail to cite (let alone rebut) the FTC Report's finding that states have many less restrictive means than a direct shipment prohibition (especially a discriminatory prohibition) to protect legitimate tax and public health interests. Perhaps in recognition of the weakness of their position, several briefs on behalf of the petitioners argue for an overruling of Supreme Court precedents that require a tight means-ends relationship with respect to discriminatory state laws. *See, e.g.*, Brief for the Petitioners 28 ("Michigan respectfully submits that *Bacchus* was wrongly decided..."); Brief of Ohio and 32 Other States as *Amici Curiae* in Support of Petitioners 10–12 ("*Bacchus* was wrongly decided and should be overruled."); Brief of National Beer Wholesalers Association

as *Amicus Curiae* in Support of Petitioners 15 n.10 ("*Bacchus* should at the least be confined to its unique facts and procedural history."). That extreme position should be rejected. The nondiscrimination principle of the dormant Commerce Clause serves compelling economic interests that would otherwise be unprotected.

To be sure, economic rents tend to dissipate, and there are reasons to believe that this is already happening in the wine distribution market. McFadden at 3. The relevant consideration, however, is the time horizon. One can argue, for example, that monopolies will inevitably disappear over time and that the only function of antitrust law is to shorten the time frame over which that result will occur. Frank H. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1 (1984). But while that consideration counsels caution in extending legal norms to poorly understood contexts, the game is plainly worth the candle when we can be sure about the results of applying the basic rules to the easy cases. These cases, as explained to us, do not call for an extension of the dormant Commerce Clause; they confront the hard core of that doctrine with an openly discriminatory state violation. Reliance on long-term economic forces is no reason to repeal Section 1 of the Sherman Act or to suspend the operation of the dormant Commerce Clause in a paradigmatic discrimination case.

Nor is there any comfort in the observation that the costs of state prohibitions of direct wine shipments will in all events be paid by regulating states' own citizens. The ready answer is that this Court has steadfastly rejected, in cases involving discriminatory state regulation, the argument that the in-state incidence of the costs somehow exempt a discriminatory regime from Commerce Clause condemnation. *West Lynn Creamery v. Healy*, 512 U.S. 186, 203 (1994); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 271–73 (1984). For one thing, there are two sides to every interstate transaction, and the dormant Commerce Clause protects the out-of-state seller at least to the same extent

as the in-state consumer. *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 539 (1949). See also *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 267 (1984) (out-of-state wholesalers have standing to challenge discriminatory tax exemption for in-state producers). For another thing, the incidence of a discriminatory tax or regulation does not necessarily match its form or stated range of application. This implies that from a strictly economic perspective, a formal nondiscrimination principle will be both under- and over-inclusive. However, economists agree that incidence analysis is a devilishly difficult and uncertain business for which courts are poorly equipped. Stephen F. Williams, *Severance Taxes and Federalism: The Role of the Supreme Court in Preserving a National Common Market for Energy Supplies*, 53 Colo. L. Rev. 281, 290–95 (1982). The true test of an efficient legal rule is not to get every case right but to reduce error costs in the general run of cases. The Court's nondiscrimination rule, which condemns discriminatory state laws irrespective of their economic incidence, satisfies that criterion.

B. Direct Shipping Restrictions Owe Their Continued Existence to Protectionist Interest Group Pressures Rather Than Considerations of Consumer Welfare

The three-tier system was constructed in the wake of the Twenty-first Amendment. Its principal purpose was to preclude the re-emergence of a "tied" system between producers and exclusive retailers. That system, it was widely believed, had before Prohibition induced excessive alcohol consumption and enabled organized crime to gain influence over alcohol distribution and sales. Even the best-constructed and most public-spirited regulatory system, however, may outlive its usefulness (for example, on account of technological change in the regulated industries) and, moreover, mutate into a means of

protecting private rather than public interests. Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & Econ. 211 (1976); Richard A. Posner, *Theories of Economic Regulation*, 5 Bell J. Econ. 335 (1974); George Stigler, *The Theory of Economic Regulation*, 2 Bell J. Econ. 3 (1971).

In the decades following the enactment of the Twenty-First Amendment, virtually all states adopted a three-tier system. Most states enacted direct shipment prohibitions to protect that system, but those restrictions played only a small role, as the technologies of those times rendered remote transactions between producers and consumers uneconomic. In 1986, however, California limited direct shipment to imports from states that would permit, on a reciprocal basis, the direct shipment of California wines to their citizen-consumers. The economic logic is not hard to fathom: by limiting direct shipment rights to reciprocity states, California—home to the nation's largest wine industry—sought to open other states' markets to its domestic producers.

California's move prompted a change from a relatively homogeneous state regulatory environment to the current patchwork of state alcohol regulation. Some states responded relatively quickly in the manner hoped for by California; there are now 13 reciprocity states. Many other states loosened their restrictions and allowed direct shipments from out-of-state, often under a permit system. A few states, however, Michigan among them, tightened their direct shipment regulations.

The fierce contention over direct interstate shipments, which has at last reached this Court, is driven by interest groups. On one side are wine consumers, allied with small wineries that seek to satisfy consumer demand for small-volume, high-end wines but are inhibited in that endeavor by the existing distribution system. (Large wineries, which fare perfectly well under the existing distribution system and some of which have succeeded in establishing their own national distribution networks, are sitting on the sidelines.) On the other side stands

an unusual coalition. Bruce Yandle, *Bootleggers and Baptists: The Education of a Regulatory Economist*, Regulation 12 (May/June 1983). The wholesalers of alcoholic beverages have emerged as the nation's staunchest and most resourceful advocates of temperance. More traditional temperance forces, for their part, have complemented their moral arguments with a rigorous defense of the regulatory bottleneck and to that end joined forces with the alcohol wholesalers. This unlikely coalition enjoys the support of public sector interests—that is, state regulators and tax administrators.

These interest group alignments permit inferences both with respect to marketplace economics and with respect to the credibility of public-interest rationales to suppress competition. The interests that advocate a repeal of restrictions of direct interstate wine shipping (whether by legislative means or as a constitutional proposition) are by and large open about their economic self-interest, but they can buttress their position with arguments of consumer welfare. In contrast, the defenders of the existing distribution system have failed to defend their position on economic grounds, because no such grounds exist. They have instead relied on purported public interest rationales other than consumer welfare, some of which are diametrically opposed to their manifest economic interests.

The variegated state responses to California's unilateral adoption of a reciprocity regime in 1986 suggest an obvious question: why did formerly homogenous state regulatory regimes generate such disparate responses? Riekhof's and Sykuta's sophisticated analysis directly addresses that question and finds "that economic interests play a significant role in determining a state's adoption of direct shipment [regulations], but no evidence supporting a general public interest motivation." Riekhof & Sykuta at 4. That finding is highly plausible even at an intuitive level: "If direct shipment prohibitions prior to 1986 were in place solely for public interest reasons, it would be difficult to explain why

California's decision to adopt reciprocity would have its intended effect of opening up access to no-shipment states." *Id.* at 12. Unsurprisingly, the authors find that the size of a state's wine industry (number of wineries relative to state wine consumption) is positively related to the adoption of reciprocity laws. Conversely, the size and concentration of the distributor industry are negatively correlated with the likelihood that reciprocity legislation will be enacted. *Id.* at 22. Riekhof & Sykuta found that public sector interests (such as tax collections) also affect state responses. In contrast, none of the authors' proxies for public interest considerations appeared to have a significant effect on state policy responses. *Id.* These results are highly consistent with well-accepted general economic theories of regulation. They directly affect the present case: "To the extent that public welfare interests are required by courts to justify states' restrictions on interstate commerce, our results cast a shadow of doubt on public interest arguments in the area of direct shipment of wine." *Id.* at 26.

C. The Constitutional Principle of Non-Discrimination, as Applied by This Court, is Supported by Sound Economic Reasoning

Every federal system (loosely speaking) confronts the challenge of reconciling open borders—a minimum condition of an integrated national market—with the preservation of the member-states' legitimate regulatory powers. A number of principles answer to the task—none of them perfectly, but some well enough. *See generally* Michael Trebilcock & Robert Howse, *A Cautious View of International Harmonization: Implications from Breton's Theory of Competitive Governments, in Competition & Structure: The Political Economy of Collective Decisions* 386 (Gianluigi Galeotti, Pierre Salmon, & Ronald Wintrobe eds., 2000).

As has been pointed out, the governing principle should be stated explicitly in the federal system's general charter. See Antonin Scalia, Chapter 16 in *Federalism in a Changing World: Learning from Each Other* 539 (Raoul Blindenbacher & Arnold Koller eds., 2003) (explaining the advantages of the nondiscrimination rule for a European audience). But the need for a harmonizing principle is so strong that courts have felt compelled to infer it even where the governing instruments do not literally provide for it. The European Court of Justice, for example, has inferred from the European Treaties a principle of "mutual recognition," which (in the absence of countervailing regulations by the European Commission) compels member-states to open their markets to other EU countries' goods so long as those goods conform to the regulatory requirements of the origin state (rather than the destination state). *Rewe Zentrale v. Bundesmonopolverwaltung für Branntwein* (Cassis de Dijon), 120/78 [1979] ECR 649, [1979] 3 CMLR 494. This principle directly bars member-state regulations that discriminate against other member-countries' producers. It is enforced in part through a demanding "least restrictive means" test, which compels member-states to pursue regulatory objectives that have discriminatory effects by means that minimize those effects. *Commission v. Germany*, 178/84 [1987] ECR 1227, [1988] 1 CMLR 780; *Walter Rau v. de Smedt*, 261/81 [1982] ECR 3961, [1983] 2 CMLR 496.

A principal alternative—more respectful of state regulatory authority than mutual recognition—is the principle of nondiscrimination. As explained to us, this principle is embodied in this Court's decisions under the dormant Commerce Clause. Viewed through economists' eyes, this principle appears to serve important economic functions. First, it obviously represents a middle path between forced exclusion (which could Balkanize the economy) and forced entry by outsiders (which would eviscerate the states' police powers). Second, the principle serves as a vital safeguard against "naked"

interest group transfers (or, as the Founders called it, "partial legislation") that serve no public purpose but merely transfer wealth—typically, from unorganized constituencies (such as consumers) to highly organized interests (such as liquor distributors). The presumption against such transfers pervades the entire Constitution. Cass Sunstein, *Naked Preferences and the Constitution*, 84 Colum. L. Rev. 1689 (1984).

A non-discrimination principle in interstate commerce provides no protection against purely in-state exploitation. But it need not do so: the principal protections come from the fact that citizens vote, both at the ballot box and with their feet (that is, by leaving states that give too wide a berth to interest group exploitation). Precisely for fear of those consequences, state-level factions will seek to impose the costs of their schemes on outsiders, by regulating on an extra-territorial basis or by enacting schemes that exempt in-state interests from burdensome tax or regulatory schemes. The dormant Commerce Clause rightly prohibits both stratagems. *See, respectively*, *Healy v. The Beer Institute*, 491 U.S. 324 (1989); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984). In that fashion, the non-discrimination rule curbs the destructive force of faction on the decisive margin. *See generally* Saul Levmore, *Interstate Exploitation and Judicial Intervention*, 69 Va. L. Rev. 563 (1983) (arguing that the Supreme Court has employed the dormant Commerce Clause, and should continue to employ it, as a means of preventing interstate exploitation).

These elementary considerations apply with full force to the present context. Michigan may permit direct wine shipments (even while prohibiting direct shipments of liquor or beer), or it may prohibit such shipments for all market participants, in-state and out-of-state. What the state may not do, barring the strongest possible justification, is to discriminate against out-of-state parties. The economic justification for that rule, to repeat, is that such discrimination is a highly reliable signal for illicit interest group transfers. If a state is unwilling to impose the

costs of some regulatory scheme on in-state producers (on a proportional basis), its proffered public interest rationales for the regulation are likely a pretext for redistribution. That presumption may be overcome only by an exceedingly persuasive showing that the geographic discrimination in fact corresponds to a pressing public purpose. *Maine v. Taylor*, 477 U.S. 131 (1986). Put differently, the nondiscrimination rule of the dormant Commerce Clause holds in-state interests hostage to the purpose of distinguishing bona fide public purposes from naked interest group transfers. While the burdened interest in a particular state will resent that fact in any given case, the rule works with perfect symmetry: the injunction against home-state preferences is the flipside of the more important right of nondiscriminatory access to other states' markets. Economic actors unaware of which economic position they would assume after a random assignment would therefore, if rational, choose a non-discrimination rule that limits opportunities for exploitation on all sides. *See generally*, Geoffrey Brennan & James M. Buchanan, *The Power to Tax* (1980). Accordingly, there is no obvious economic reason for recognizing opportunistic preferences in favor of discrimination adopted after the fact.

CONCLUSION

For the foregoing reasons, the decision of the Sixth Circuit should be affirmed.

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IN THE

Supreme Court of the United States

JENNIFER M. GRANHOLM, *et al.*

Petitioners,

v.

ELEANOR HEALD, *et al.*

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF AMICUS CURIAE OF AMERICAN HOMEOWNERS ALLIANCE; AMERICAN LEGISLATIVE EXCHANGE COUNCIL; AMERICANS FOR TECHNOLOGY LEADERSHIP; COMPETITIVE ENTERPRISE INSTITUTE; CONSUMER ALERT; eBAY, INC.; INFORMATION TECHNOLOGY ASSOCIATION OF AMERICA; INTERNET COMMERCE COALITION; NETCHOICE; PACIFIC RESEARCH INSTITUTE; THE PROGRESS & FREEDOM FOUNDATION; SOFTWARE & INFORMATION INDUSTRY ASSOCIATION IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICI*[*]

Amici are entities involved directly or through their members in electronic commerce. We submit this brief to highlight the significance of these cases for e-commerce, not only relating to wine, but also in other goods and services.

The **American Homeowners Alliance** represents the nation's 70 million homeowners in their desire to use the Internet to its full potential to efficiently and economically obtain the goods and services they need and desire.

The **American Legislative Exchange Council** (ALEC) is the nation's largest bipartisan association of state legislators. Its mission is to discuss, develop, and disseminate public policies that expand free markets, promote economic growth, limit government, and preserve individual liberty. ALEC's interest in this case stems from its concern that laws unnecessarily restricting competition by forcing consumers to utilize an antiquated monopoly system have established false barriers that discriminate against e-commerce and free market forces.

Americans for Technology Leadership (ATL) is a broad-based coalition of technology professionals, consumers and organizations dedicated to limiting government regulation of technology and fostering competitive market solutions to public policy issues affecting the technology industry. ATL's interest in this proceeding stems from its work to allow the growth of technology, including e-commerce, without burdensome government regulation.

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[*] Consent to the filing of *amicus* briefs has been lodged with the Clerk of this Court. No counsel to a party has authored any portion of this brief. No party or entity other than those listed as amici on the cover of this brief has contributed monetarily to the preparation or submission of this brief.

The **Competitive Enterprise Institute** is a nonpartisan policy analysis organization, dedicated to the principles of limited constitutional government and free enterprise. The Competitive Enterprise Institute has a substantial interest in supporting the position that the Commerce Clause protects the national market from protectionist state legislation and has a specific interest in alcohol-related issues.

Consumer Alert is a national non-partisan, non-profit consumer organization dedicated to enhancing understanding and appreciation of the free market. Consumer Alert accordingly provides economic, scientific, and risk data affecting public policy decisions to legislative and regulatory bodies, courts, the media and the public. Consumer Alert has an interest in this case because its members are harmed by the limitations on free trade imposed by state bans on direct shipment of out-of-state wine.

eBay Inc. with over 100 million registered users, is the world's largest online marketplace and the most popular shopping site on the Internet. Using eBay's online services, buyers can search for and buy goods and services in thousands of categories.

The **Internet Commerce Coalition** (ICC) is a coalition of Internet service providers, e-commerce companies, and trade associations in the United States. ICC's members include AT&T, BellSouth Corporation, Comcast Corporation, eBay Inc., MCI, Inc., SBC Communications Inc., Time Warner, and Verizon Communications.

The **Information Technology Association of America** (ITAA) provides global public policy, business networking, and national leadership to promote the continued rapid growth of the information technology industry. ITAA 's members range from the smallest information technology

start-ups to industry leaders in the Internet, software, information services, digital content, systems integration, telecommunications, and enterprise solution fields

NetChoice is a coalition of businesses and consumers who are united in promoting the increased choice and convenience enabled by e-commerce. NetChoice members have a direct interest in preventing and removing barriers to e-commerce, such as protectionist laws that prevent interstate shipments of wine.

The **Pacific Research Institute** is a non-partisan, non-profit think tank based in San Francisco that focuses on finding market-based solutions to important public policy problems. One of PRI's key areas of research is electronic commerce. PRI's members are consumers who are harmed by the limitations on free trade imposed by the ban on direct shipment of out-of-state wine by the states of New York and Michigan.

The **Progress & Freedom Foundation** is a non-profit research and educational institution that studies the digital revolution and its implications for public policy, based on a philosophy of limited government, free markets and individual sovereignty. PFF's underlying philosophy combines an appreciation for the positive impacts of technology with a classically conservative view of the proper role of government. PFF's interest in this proceeding stems from its commitment to promoting expanded use of the Internet for e-commerce, free of discriminatory state regulation.

The **Software & Information Industry Association** (SIIA) is the leading U.S. trade association committed to promoting and protecting the interests of the software and information industries. SIIA represents over 600 member companies,

including prominent publishers of software and information products for reference, education, business, consumer, Internet and entertainment uses.

SUMMARY OF ARGUMENT

As interstate commerce has grown, businesses have used a variety of technological means—from mail-order-catalogs to 1-800 numbers to, most recently, electronic commerce using the Internet—to reach consumers nationwide. E-commerce facilitates the realization of the Founders' vision of a national common market by permitting even the smallest merchant to reach consumers in every state and by giving consumers the broadest possible choice of products and vendors. As this Court has repeatedly recognized, that market will be destroyed if states are permitted to enact measures that discriminate against interstate commerce in favor of local economic interests.

Michigan's prohibition on direct sales by out-of-state wineries to Michigan consumers, while simultaneously permitting direct sales by Michigan wineries, is such a discriminatory measure. Under established dormant Commerce Clause doctrine, such measures are constitutional only if the state bears the burden of showing the absence of nondiscriminatory means to advance its legitimate interests. In this case, the state's asserted interests of ensuring revenue collection and preventing sales to minors do not require discrimination against interstate sales and the attendant obstruction of e-commerce.

The Twenty-first Amendment does not save Michigan's otherwise unconstitutional discrimination. The assertion that the Twenty-first Amendment trumps the Commerce Clause when the state regulates the importation

of wine is untenable and contrary to this Court's precedents. The Twenty-first Amendment is not a license to discriminate against interstate sales or to protect local merchants from interstate competition. By permitting in-state wineries to make direct sales to consumers, while prohibiting all out-of-state wineries from making such sales, Michigan has exceeded the temperance interests that the Twenty-first Amendment was designed to protect, and its discriminatory regime must fall as offensive to the Commerce Clause.

ARGUMENT

I. INTERSTATE E-COMMERCE IS AN IMPORTANT PART OF THE NATIONAL COMMON MARKET THAT THE DORMANT COMMERCE CLAUSE IS DESIGNED TO PROTECT

This is a case about discriminatory state regulation of the sale of wine. More fundamentally, it is a case about the viability of interstate electronic commerce ("e-commerce") in the United States. Petitioners consider the interstate buying and selling of products and services via the Internet as a threatened "major breach of state regulatory regimes," Wholesalers' Br. at 38, and ask the Court to approve Michigan's blatantly discriminatory legislation in response to that threat. But interstate e-commerce, whatever the challenges it may pose to entrenched commercial interests and state regulatory bureaucracies, is also the most dramatic modern manifestation of the national common market that the Framers of the Constitution sought to promote. The protection of that market is the paramount goal of the Commerce Clause. *Amici*, organizations committed to the growth of e-commerce, urge the Court to take this opportunity to clearly delineate the crucial role of the

dormant Commerce Clause in preventing local protectionism from undermining that national market and the benefits it brings to consumers and businesses throughout America.

When the Framers wrote the Commerce Clause, they recognized the profound importance that a national market would have for the nation as a whole, as well as for the individual states. *See The Federalist* No. 42 (James Madison); Letter from James Madison to Joseph C. Cabell (Sept. 18, 1828), *available at* http://press-pubs.uchicago.edu/founders/documents/a1_8_3_commerces18.html. Although the Framers could not have imagined the technological advances that have led to the Internet, they could imagine, and worked to establish, the open, nondiscriminatory, and national market that the Internet and e-commerce have come to epitomize. As this Court recognized in *H.P. Hood & Sons, Inc. v. DuMond*, access to a national market is a strong incentive for economically productive activities, and a powerful check on state protectionism:

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation. . . . Likewise, every consumer may look to the free competition of every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

336 U.S. 525, 539 (1949). As the national market has grown, small businesses have participated in it by using a variety of tools—mail order catalogues, 1-800 numbers, and, most recently, the Internet. The Internet is the quintessential interstate commerce medium that overcomes the tyranny of

distance, letting sellers in every state reach customers in every other state, thus fulfilling the Founders' vision of a single national market.

A. E-Commerce Delivers Substantial Benefits to Consumers and Small Businesses

E-commerce delivers tangible benefits to all participants in the U.S. economy, but especially to consumers and small businesses. The United States Department of Commerce Census Bureau tracks e-commerce retail sales, which provide a compelling picture of the rapidly increasing role of e-commerce in the national economy. Retail e-commerce sales in the second quarter of 2004 amounted to $15.7 billion, up 23.1% from the second quarter of 2003, and representing 1.7% of the $919 billion in total U.S. retail sales during that period. *See* U.S. Census Bureau, *Retail E-Commerce Sales in Second Quarter 2004 Were $15.7 Billion, Up 23.1 Percent From Second Quarter 2003, Census Bureau Reports,* United States Department of Commerce News (Aug. 20, 2004), *available at* http://www.census.gov/mrts/www/current.html. Since the fourth quarter of 1999, when the Census Bureau began publishing this data, e-commerce retail sales have increased 193%. *See id.*[1] Online retail sales are growing at ten times the rate of their "brick-and-mortar" counterparts. *See State Impediments to E-commerce: Consumer Protection or Veiled Protectionism: Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection of the House Comm. on Energy and Commerce,* 107th Cong. 2d Sess. 7 (2002)

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[1] Some knowledgeable observers estimate even greater numbers. For example, *amicus* Progress & Freedom Foundation estimates that business to consumer electronic commerce is expected to grow from $95.7 billion in 2003 to $229 billion in 2008. The Progress & Freedom Foundation, *Digital Economy Fact Book* 63 (6th Ed. 2004).

[hereinafter *Commerce Committee Hearing*]. As of 2002, e-commerce between businesses had reached roughly $1 trillion per year, *see Commerce Committee Hearing*, at 1 (statement of Rep. Cliff Stearns, Chairman, House Subcomm. on Commerce, Trade, and Consumer Protection). Such growth is staggering, and directly attributable to the protections offered by the dormant Commerce Clause and its assurance of a national marketplace.

E-commerce is available for virtually *all* products and services, from BMWs to bulldozers, antique furniture to hi-tech computers; from the oldest vinyl records to the most recent DVDs, and for a widening array of services, from graphic design to auto repair. *See, e.g., Commerce Committee Hearing*, at 15; Fed. Trade Comm'n, *Possible Anticompetitive Barriers to E-Commerce: Wine* 2 n.3 (2003), *available at* http://www.ftc.gov/os/2003/07/winereport2.pdf [hereinafter *FTC Study*]. Perhaps the quintessential business illustrating this is that of *amicus* eBay, an online marketplace bringing together over 100 million registered buyers and sellers, and currently containing more than 20 million listings, including those products and services mentioned above, in over 45,000 discrete categories.

The benefits of e-commerce to consumers are the benefits of market competition: greater choice and lower prices. Consumers now have the ability to do nationwide comparison shopping for nearly everything they buy, and e-commerce has lowered the costs of doing business across state lines. Online sellers must compete not only with other online sellers, but also with those working in traditional retail channels. Likewise, traditional "brick-and-mortar" businesses can no longer base their prices on what the local market permits but must consider the price for similar goods on Internet sites. E-commerce has proved essential to many small businesses, who have gained access to larger markets

without having to pay fees to middlemen or setting additional distribution channels.

As a result, consumers have the opportunity to choose the most attractive product from a variety of online and traditional sellers. This vigorous national competition has driven prices down, benefiting both consumers and the economy. That same competition, however, has begun to displace entrenched local commercial interests who view the Internet as a threat. As in the case of wine sales, these interests often seek discriminatory state regulation in order to stifle the growth of e-commerce.

B. Discriminatory State Barriers Are Restraining the Growth of E-Commerce

The benefits of e-commerce to the national economy cannot be fully realized if states may enact regulations that discriminate against interstate transactions.[2] The laws at issue in this case, and in *Swedenburg v. Kelly*, No. 03-1274 (2004), are just such enactments: they make difficult or

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[2] A number of lower courts have recognized that the inherently interstate nature of the Internet renders e-commerce especially vulnerable to varying state regulations, and courts have properly given that factor special importance when undertaking dormant commerce clause analysis. *See e.g., Center for Democracy & Tech. v. Pappert*, No. 03-5051, 2004 U.S. Dist. LEXIS 18295 (E.D. Pa. Sept. 10, 2004); *Cyberspace Communs., Inc. v. Engler*, 55 F. Supp. 2d 737, 751-52 (E.D. Mich. 1999); *Am. Library Ass'n v. Pataki*, 969 F. Supp. 160, 168-69 (S.D.N.Y. 1997) ("The unique nature of the Internet highlights the likelihood that a single actor might be subject to haphazard, uncoordinated, and even outright inconsistent regulation by states that the actor never intended to reach and possibly was unaware were being accessed. Typically, states' jurisdictional limits are related to geography; geography, however, is a virtually meaningless construct on the Internet.").

impossible the very type of interstate commercial activity most significantly enhanced through e-commerce.

The specific barriers in question here and their counterparts in other states have dramatically stunted the sale and purchase of wine over the Internet. In its recent report on state barriers to e-commerce in the wine industry, the Federal Trade Commission (FTC) notes that "[s]tate bans on interstate direct shipping represent the single largest regulatory barrier to expanded e-commerce in wine." *FTC Study*, at 3.

Although the regulations challenged in this case arise in the context of the sale of wine, they are similar to barriers erected by states with regard to other products, where dubious consumer-protection rationales have been used to block online competition from out-of-state sellers. In its recent decision dealing with state barriers to casket sales, the 10th Circuit concluded, "While baseball may be the national pastime of the citizenry, dishing out special economic benefits to certain in-state industries remains the favored pastime of state and local governments." *Powers v. Harris*, 2004 U.S. App. LEXIS 17926, at *35 (10th Cir. Aug. 23, 2004).

For example, at the urging of state-licensed ophthalmologists, a number of states have sought to discourage the online sale of disposable contact lenses through a variety of discriminatory mechanisms. These include prohibiting customers from getting access to their prescriptions, restricting contact lens sales to only face-to-face transactions, and artificially shortening the length of a contact lens' prescription life-span in order to force consumers to have their eyes checked more frequently, and to purchase new contact lenses from their local eye-care providers. *See, e.g.*, Fed. Trade Comm'n, *Public Workshop: Possible Anticompetitive Effects to Restrict Competition on the Internet*, Tr. at 321, *et seq.* (Oct. 9, 2002), *available at* http://www.ftc.gov/opp/e-commerce/anticompetitive/021009antitrans.pdf [hereinafter *FTC Workshop*]. *See also Commerce Committee Hearing*, at 26-27.

As another example, some states have placed onerous restrictions on the sale of caskets, such as requiring residents to purchase caskets only from state-licensed funeral directors. *See, e.g., FTC Workshop*, at 459 *et seq.* This can be a substantial burden for online sellers, who must spend significant time and money to become licensed funeral directors in order to comply with state regulation. *See Craigsmiles v. Giles*, 312 F. 3d 220 (6th Cir. 2002) (finding that Tennessee's prohibition against the retail sale of caskets by anyone but licensed funeral directors was not rationally related to a legitimate state interest). *But see Powers*, 2004 U.S. App. LEXIS 17926, at *6, *10 (upholding, against challenges unrelated to the Commerce Clause, Oklahoma's prohibition against intrastate online casket sales by anyone but licensed funeral directors).

Although these situations involve different products,[3] they share a common trait: as in the cases currently before the Court, parochial business interests have used protectionist state legislation in an attempt to insulate themselves from the interstate competition that e-commerce permits. *See, e.g., Giles*, 312 F.3d at 225 (describing restrictions on casket sales as "nothing more than an attempt

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[3] Besides caskets and contact lenses, protectionist state barriers against e-commerce have been identified with respect to a number of other products, including automobiles, and for some services, such as real estate, mortgages, and financial services. *See Commerce Committee Hearing*, at 2 (statement of Rep. Cliff Stearns). *See also FTC Study*, at 2 n.3.

to prevent economic competition," and describing the state's justifications as frivolous); *Commerce Committee Hearing*, at 22-23 (describing resistance to online sales of contact lenses by eye doctors, even though many alternative ways to address health and safety concerns existed).

While Congress certainly could, and sometimes does, exercise its affirmative Commerce Clause powers to prevent this kind of discriminatory state regulation,[4] it cannot possibly keep track of or act to repel the constant pressure for anti-competitive state legislation. The dormant Commerce Clause operates as the structural bulwark and guardian of the national market-place against the natural tendencies of local interests to capture the machinery of state government to advantage themselves and burden their distant, widely-dispersed competitors. This Court has made clear that, even where Congress has not chosen to act, the Commerce Clause operates to prevent the kind of economic Balkanization that would result from unchecked state discrimination against interstate commerce. *See, e.g., Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564, 595 (1997) ("The history of our Commerce Clause jurisprudence has shown that even the smallest scale discrimination can interfere with the project of our federal Union. As Justice Cardozo recognized, to countenance discrimination … would invite significant inroads on our "national solidarity") (internal citation omitted); *Fort Gratiot Sanitary Landfill v. Michigan Dep't of Natural Resources*, 504 U.S. 353, 359 (1992) ("As we have long recognized, the 'negative' or 'dormant' aspect of the Commerce Clause prohibits States from 'advancing their own commercial interests by curtailing the movement of articles of commerce,

[4] Congress has exercised its Commerce Clause authority with respect to contact lenses by passing the Fairness to Contact Lens Consumer Act, 15 U.S.C. §§ 7601-7610 (2004), which prohibits anti-competitive activities surrounding contact lens sales.

either into or out of the state.'") (internal citation omitted); *Hughes v. Oklahoma*, 441 U.S. 322, 326 (1979).

Nor is the rationale of the dormant Commerce Clause purely economic. By refusing to countenance local protectionism, the Commerce Clause reins in the natural tendency to parochialism in local policymaking, and provides incentives for legislators to consider broader public concerns. Thus, like the Privileges and Immunities Clause, U.S. Const. art. IV, § 2, cl. 1, the Commerce Clause reinforces the structural integrity of the Union created by the Constitution, another reason why its goals have long been considered the "object riding over every other in the adoption of the constitution." *Gibbons v. Ogden*, 22 U.S. 1, 231 (1824) (Johnson, J., concurring).

II. MICHIGAN'S DISCRIMINATORY LICENSING SCHEME VIOLATES THE DORMANT COMMMERCE CLAUSE.

The Sixth Circuit employed the correct analytical approach in striking down Michigan's discriminatory prohibition of interstate wine sales. It used the two-step process previously employed by this Court in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 274 (1984): first, determining whether the state's discriminatory regulation would violate the dormant Commerce Clause if alcoholic beverages were not involved; and second, if it would, whether the Twenty-first Amendment saves the otherwise unconstitutional law. *Heald v. Engler*, 342 F.3d 517, 524 (6th Cir. 2003), *cert. granted sub nom. Granholm v. Heald*, 124 S. Ct. 2389 (2004). *See also, e.g., Healy v. Beer Inst.*, 491 U.S. 324, 342-43 (1989) (refusing to uphold price affirmation on Twenty-first Amendment grounds after engaging in Commerce Clause analysis); *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S.

573, 584 (1986) (applying two-step analysis and rejecting argument that Twenty-first Amendment immunizes state statutes from Commerce Clause scrutiny).

Here, the answer to the first inquiry is straightforward: Michigan's discriminatory scheme would certainly violate the dormant Commerce Clause if applied to commerce in any product other than alcoholic beverages. Even those courts that have upheld discrimination like that involved in this case have readily conceded its invalidity in the absence of the Twenty-first Amendment. *See Swedenburg v. Kelly*, 358 F.3d 223, 238 (2d Cir. 2004), *cert. granted*, 124 S. Ct. 2391 (2004) ("We fully recognize that the physical presence requirement [of New York's alcohol regulation] could create substantial dormant Commerce Clause problems if this licensing scheme regulated a commodity other than alcohol."); *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 851 (7th Cir. 2000) ("If the product were cheese rather than wine, Indiana would not be able. . . to close its borders").

A. Statutes That Discriminate Against Interstate Commerce Are Virtually Always Invalid Under The Dormant Commerce Clause.

Michigan's discrimination against out-of-state sellers offends deeply rooted Commerce Clause principles. The incorporation of the Clause into the Constitution reflected the Founders' acknowledgement that states could become captive to local interests to the detriment of the nation as a whole. *See The Federalist* No. 7 (Alexander Hamilton). In recognition of this core principle, the Court has held that statutes that discriminate against interstate commerce in purpose or effect are virtually *per se* invalid. *See, e.g., Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). "The

central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent." *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994) (citing *The Federalist* No. 22, at 143-145 (Alexander Hamilton) (Clinton Rossiter ed., 1961) and James Madison, *Vices of the Political System of the United States, in Writings of James Madison* 362-363 (Gaillard Hunt ed., 1901)). "The evil of protectionism can reside in legislative means as well as legislative ends." *New Jersey*, 437 U.S. at 626.

If a state statute treats in-state and out-of-state actors differently in a way that favors the in-state interests and disfavors out-of-state interests, that regulation is discriminatory for dormant Commerce Clause purposes. *See Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality of Ore.*, 511 U.S. 93, 99 (1994). Here, Michigan's statutory scheme permits in-state wineries to sell their products directly to consumers over the Internet, as some of them do. *See Heald v. Engler*, 342 F.3d at 521[5] In contrast, out-of-state wineries may not sell directly to consumers, over the Internet or otherwise, but may sell to Michigan consumers only through Michigan wholesalers and retailers.[6] *See, e.g.*, Mich. Comp.

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[5] *See also, e.g.*, Chateau Grand Traverse, *at* http://www.cgtwines.com (Michigan winery advertising over the Internet and accepting phone, fax, and mail orders), (last visited Sept. 21, 2004); Chateau Chantal, *at* http://www.chateauchantal.com (Michigan winery shipping directly to consumers but requiring an adult signature on delivery) (last visited Sept. 21, 2004); Contessa Wine Cellars, *at* http://www.contessawinecellars.com (shipping within Michigan and accepting online orders) (last visited Sept. 21, 2004).

[6] Like many states, Michigan has set up a three-level system of alcohol distribution, similar to that established by many states after the repeal of prohibition. Suppliers may sell only to licensed wholesalers; wholesalers may sell only to licensed retailers; and only licensed retailers

Laws § 436.1203 (2004) (prohibiting out of state wine sellers from selling directly to consumers); *Heald*, 342 F.3d at 521 (explaining the Michigan restrictions and quoting the Michigan Liquor Control Commission for the statement that "there is no procedure whereby an out-of-state retailer or winery can obtain a license or approval to deliver wine directly to Michigan residents."). This differential treatment ensures that out-of-state wineries have severely reduced access to Michigan customers and that those wineries must share revenues with middlemen, thus reducing profits and increasing prices to consumers, as compared with the price of Michigan wines. *See Bainbridge*, 311 F. 3d at 1106-07; *cf. Beskind v. Easley*, 325 F.3d 506, 520 (4th Cir. 2003) (noting that direct shipping ban increases access only to wine produced in-state).

Like the other courts of appeals that have held similar out-of-state shipping bans unconstitutional,[7] the Sixth Circuit correctly found that Michigan's statutory scheme is discriminatory. *Heald*, 342 F.3d at 527-28. The presence of that discrimination requires the state to demonstrate the absence of nondiscriminatory means to advance the state's legitimate purposes. *See, e.g., id.; Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979). That is a showing that Michigan has failed to make.

– and, tellingly, Michigan-based wineries – may sell to consumers. All retailers, including Michigan direct shippers, must have a presence in the state. Thus the Michigan system is also biased towards offline "brick-and-mortar" transactions, and against those carried out online.

[7] *See, e.g., Beskind v. Easley*, 325 F.3d 506 (4th Cir. 2003) (finding North Carolina's restriction on out-of-state direct shipping to be discriminatory); *Bainbridge v. Turner*, 311 F.3d 1104 (11th Cir. 2002) (striking down discriminatory Florida law that prohibited the use of common carriers to deliver wine, but permitted in-state wineries to have their own delivery fleets).

Even if Michigan were to adjust its system, as New York has done, *see Swedenburg v. Kelly*, 358 F.3d 223, 238-39 (2d Cir. 2004), to allow direct sales by any licensed entity with a physical presence in the state, it would not change the fundamentally discriminatory character of its regime, and would not save it from invalidity under the Commerce Clause. Physical presence requirements, while facially neutral, clearly discriminate against online sellers by raising their costs. To require a vintner to establish an office in New York as a precondition to allowing Internet sales to be fulfilled by direct shipment from the vineyard in California is economically irrational, and serves only to eliminate "one of the main efficiency benefits of e-commerce, the ability to provide goods and services over large distances without the need for a substantial, far-flung physical presence." Letter from Todd J. Zywicki, Director, Office of Policy Planning, Federal Trade Commission, to William Magee, Chairman, Assembly Agriculture Committee of the State of New York 13 (March 29, 2004), *available at* http://www.ftc.gov/be/v040012.pdf. The inescapable clash between physical presence requirements and the Commerce Clause's core objective of promoting growth of national markets renders this species of protectionist discrimination, which weighs most heavily on e-commerce participants, just as objectionable as the facial discrimination practiced by Michigan. *See Halliburton Oil Well Cementing Co. v. Reilly*, 373 U.S. 64, 72 (1963) (a state cannot require an out-of-state company to "become a resident in order to compete on equal terms.").

B. Michigan Has Failed To Demonstrate that It Has No Nondiscriminatory Means of Advancing Its Legitimate State Interests.

Facially discriminatory statutes such as Michigan's receive the highest level of judicial scrutiny. *See, e.g.,*

Hughes, 441 U.S. at 337 ("At a minimum such facial discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives."). The Court routinely refers to such statutes as being virtually *per se* invalid. *See New Jersey*, 437 U.S. at 624, reflecting the fact that nondiscriminatory means almost always exist to accomplish legitimate state objectives. Here, petitioners offer only two substantive rationales to support its discriminatory system: revenue collection and the protection of minors. *See* Wholesalers' Br. at 7, 13; Mich. Br. at 33. The state, however, has readily available nondiscriminatory means to address each of these legitimate interests.

1. Michigan Has Available Nondiscriminatory Means of Collecting Taxes on Wine.

Alone, "revenue generation is not a local interest that can justify discrimination against interstate commerce." *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 393 (1994). Michigan has a legitimate interest in taxing the consumption of wine in Michigan, regardless of where the wine originates, but it does not need to discriminate against interstate commerce in order to do so.

A number of nondiscriminatory means exist through which states can and do impose taxes in connection with direct sales of wine to consumers from out-of-state vendors. The recent study by the FTC found that most of the states that permit direct shipments of wine to consumers have, in fact, reported no significant problems with tax collection as a result of that practice. *See FTC Study*, at 4. Michigan could, for example, impose a non-discriminatory tax payable by all

in-state direct purchasers (whether from in-state or out-of-state wineries) along with nondiscriminatory reporting requirements on all direct sellers that would facilitate the identification of those purchasers. Michigan might follow the lead of other states that require delivery services such as FedEx to provide periodic reports of wine shipments to interstate consumers. *See FTC Study*, at 36-37. Alternatively, nondiscriminatory licensure requirements that would assist in revenue collection could be imposed on all direct sellers.[8] Congress has provided states with legal tools specifically designed to assist them in enforcing these and similar requirements even outside their borders. *See* Twenty-first Amendment Enforcement Act, 27 U.S.C. § 122a (2004) (giving states extra-territorial authority to sue out-of-state violators of distribution and importation laws in federal court).[9] Without full consideration of these alternatives, Michigan cannot meet its dormant Commerce Clause burden of showing a need for facially discrimination against interstate commerce.

2. Michigan Has Available Nondiscriminatory Means of Preventing Minors from Buying Wine.

The state's undoubtedly legitimate interest in protecting minors can also be satisfied through nondiscriminatory means. Petitioners argue that the Internet threatens states with "being flooded" in a sea of unregulated

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[8] However, as explained above, any requirement that licensees establish a physical presence in the state would overstep into the discriminatory realm that runs afoul of the core goals of the Commerce Clause.

[9] The Act's legislative history shows that it was enacted for the specific purpose of giving states additional law enforcement tools for collecting taxes on liquor sales and preventing sales to minors. *See* H.R. Rep. No. 106-265, at 5 (1999).

alcohol from out-of-state sources and attendant juvenile drinking problems. Wholesalers' Br. at 38; *see also* Mich. Br. at 33. The analysis by the FTC, however, suggests otherwise: "*The states that permit interstate direct shipping generally report few or no problems with shipments to minors.*" *FTC Study*, at 4 (emphasis added).[10] Michigan's position, moreover, is belied by the fact that Michigan permits its own wineries to sell directly to consumers over the Internet, or by phone, fax or mail, thus creating the same "problem" that it invokes to justify prohibition of out-of-state direct sales. In all events, nondiscriminatory means are readily available to the State, such as requiring an adult signature upon delivery. *See* Mich. Comp. Laws § 436.1203 (2004); Mich. Admin. Code r. 436.1527 (2004); Mich. Br. at 8. The common carriers that deliver direct wine purchases are fully subject to the jurisdiction of the state for violation of such a requirement.

III. THE TWENTY-FIRST AMENDMENT DOES NOT SAVE MICHIGAN'S DISCRIMINATORY STATUTORY SCHEME FROM A FINDING OF UNCONSTITUTIONALITY UNDER THE DORMANT COMMERCE CLAUSE.

Petitioners make no effort to justify Michigan's facially discriminatory alcoholic beverage regime as

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[10] In testimony to the Federal Trade Commission, Michigan did report instances of interstate sales of wine to minors. *Id.* at 35. Michigan gathered this data by using minors in a sting operation. It does not follow that because a minor might order an out-of-state case of wine over the Internet, he or she is likely to do so (rather than buying a six-pack of beer locally). *See, e.g., FTC Study* at 32, App B. (California regulator testimony to that state legislature's committees on the wine industry, stating that "I do believe the sale-to-minor issue is overblown," and suggesting that a minor intent on purchasing alcohol would not do it through mail orders).

indispensable to effectuate the state's legitimate interests. They argue instead that, as a consequence of the adoption of Section 2 of the Twenty-first Amendment, no justification for Michigan's discrimination against interstate commerce is constitutionally required. The state petitioners thus argue that, "a state is *totally unconfined* by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders." Mich. Br. at 26 (emphasis added). Wholesaler petitioners similarly argue that under the Twenty-first Amendment, states "may impose any regulation of physical importation without offending the Commerce Clause if there is any reasonably conceivable state of facts that could provide a rational basis for the regulation." Wholesalers' Br. at 14.

This position is untenable. The state regulation of alcohol does not free the state from all meaningful constitutional restraints on its ability to favor in-state economic interests by discriminating against interstate commerce. The Twenty-first Amendment creates no such license to discriminate. Indeed, a law's "discriminatory character eliminates the immunity afforded by the Twenty-first Amendment." *Healy v. Beer Inst.*, 491 U.S. at 324 (Scalia, J., concurring). The Amendment's purpose was "to allow states to prohibit the importation of alcohol, at least *through laws of a suitably nondiscriminatory sort.*" 1 Laurence H. Tribe, American Constitutional Law 1167 (3rd ed. 2000) (emphasis added). A state may use its authority under the Amendment to prevent out-of-state merchants from frustrating state temperance or regulatory policies by engaging in conduct that the state has lawfully forbidden to in-state merchants; it may not use that authority to prohibit interstate transactions on alcohol that it has chosen to permit within its borders.

A. The Purpose of the Twenty-first Amendment Was to Permit the States to Be Dry, Soaking Wet, or Somewhat Damp, Not To Permit States To Favor Local Interests By Discriminating Against Out-Of-State Producers.

This Court has characterized assertions that the Twenty-first Amendment gives states a blanket exemption from the dormant Commerce Clause as "patently bizarre and demonstrably incorrect." *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 109 (1980) (quoting *Hostetter v. Idlewild Liquor Corp*, 377 U.S. 324, 331-32 (1964)). Although early Twenty-first Amendment cases such as *State Bd. of Equalization of Cal. v. Young's Market*, 299 U.S. 59 (1936) appeared to describe a broad, virtually unqualified state power to regulate liquor, the Court has clearly withdrawn from that position. The view "that the Twenty-first Amendment has somehow operated to repeal the Commerce Clause wherever regulation of intoxicating liquors is concerned [is] an absurd oversimplification." *Hostetter*, 377 U.S. at 331-32.[11]

In resolving asserted conflicts between the Twenty-first Amendment and the Commerce Clause, courts must proceed from the premise that "[b]oth the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete

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[11] Indeed, the Court has found that a number of constitutional provisions limit state power under the Twenty-first Amendment. *See, e.g., Wisconsin v. Constantineau*, 400 U.S. 433, 436 (1971) (due process clause); *Dep't of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341, 344 (1964) (export-import clause); *Bacchus*, 468 U.S. at 276 (commerce clause); *Craig v. Boren*, 429 U.S. 190, 209 (1976) (equal protection clause).

case." *Id.* The two constitutional provisions are correctly reconciled by recognizing that the central purpose of the Twenty-first Amendment was "controlling liquor consumption *regardless of the state or nation from which the liquor might come*." Tribe, *supra*, at 1170 (emphasis added). Favoring local industries was not part of that purpose and thus "was not protected by it." *Id.* The Twenty-first Amendment thus permits the states to decide to be dry, soaking wet, or somewhat damp; it does not permit them to apply different temperance policies depending upon the *source* of an alcoholic beverage.[12] As this Court has explicitly recognized, "[d]oubts about the scope of the Amendment's authorization notwithstanding, one thing is certain: The central purpose of the provision was not to empower states to favor local liquor industries by erecting barriers to competition." *Bacchus Imports Ltd. v. Dias*, 468 U.S. at 263, 276.[13]

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[12] Petitioners seek support for their position in the legislative history of the Amendment. The Court, however, has noted that despite the legislative history's "obscurity," it provides support for the view that the amendment permits the states to be wet or dry, but not to engage in discrimination. *See Midcal*, 445 U.S. at 106-107 n.10.

[13] The discriminatory features of Michigan's regulatory regime may reflect the efforts of Michigan's wine industry. The industry contributes $75 million to the Michigan economy, $17 million of which comes from tourists who visit the wineries. *See* Michigan Grape & Wine Industry Council, *Michigan Wine Industry Honors Quarter-Century of Growing Wines*,(March 18, 2003), *at* http://www.michiganwines.com/Media/news/03182003.html. It is the 13th largest wine producer in the United States in terms of volume, and fourth in terms of the amount of land dedicated to wine production. *See* Michigan Grape & Wine Industry Council, *Fast Facts, at* http://www.michiganwines.com/Fast_Facts/fastfacts.html (last visited Sept. 21, 2004).

B. The Advent of the Internet Does Not Justify State Discrimination Against Interstate Commerce.

Petitioners invoke the development of the Internet as a post-hoc rationalization for its discrimination, claiming that "[e]lectronic commerce makes it conceivable that large amounts of alcohol could be sold via direct shipment," Wholesalers' Br. at 38, and that holding the State's discriminatory ban unconstitutional presents "new legal obstacles to enforcement." *Id. See also* Mich. Br. at 33. That fear has no empirical support. *See generally FTC Study*, at 4. More fundamentally, the success of a national marketplace certainly cannot be used as a justification for state discrimination against it. States could have, moreover, made the same argument about the development of mail-order commerce, or the introduction of marketing by telephone or fax. The Twenty-first Amendment was certainly not intended to bar commerce via modern means of communication and delivery.

Amici do not contest here the state's power to require *all* commerce in alcohol to follow the same rules. Michigan, however, has not taken that course, but has chosen to permit intrastate direct sales to consumers through any technological means, while prohibiting all interstate direct sales. That "selective approach... suggests limits on the substantiality of the interests [Michigan] asserts here." *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 715 (1984). The Sixth Circuit correctly ruled that a state cannot engage in this sort of unjustified and unjustifiable discrimination. Its decision underscores the crucial role of the dormant Commerce Clause in advancing the paramount value of a national market - epitomized by e-commerce - that surmounts protectionist hurdles. It should be affirmed.

CONCLUSION

The decision of the Court of Appeals should be affirmed.

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IN THE SUPREME COURT OF THE UNITED STATES

JENNIFER M. GRANHOLM, GOVERNOR, ET AL.,

Petitioners,

v.

ELEANOR HEALD, ET AL.,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF AMICI CURIAE STATES OF CALIFORNIA, WASHINGTON, NEW MEXICO, OREGON, AND WEST VIRGINIA IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICI CURIAE

This amici curiae brief is submitted on behalf of the states of California, Washington, New Mexico, Oregon, and West Virginia. The *amici* states have each determined that they will allow direct shipments of limited quantities of wine to consumers for personal use and that their interests in revenue collection and preventing underage access to wine can be met through regulatory controls rather than barring direct sales by all out-of-state wineries. The amici states have adopted reciprocity laws, allowing direct wine shipments from states which do not close their markets to interstate wine shipments and applying the same regulatory provisions as are applied to their in-state wineries. Additionally, wineries in some of the amici states ship their product to other states that allow direct shipments under permitting laws that address tax collection and verification of the age of the recipient of the product.

The amici states are all sovereign states that regulate the sale of alcohol pursuant to their authority under the Twenty-first Amendment to the United States Constitution. These states have strong interests in collecting tax revenues associated with alcohol sales and in preventing the access of minors to alcohol. The amici states also have a strong interest in avoiding economic protectionism that discriminates against the products of their residents.

SUMMARY OF ARGUMENT

The Twenty-first Amendment enables states to regulate importation of alcohol to a degree that

would otherwise be impermissible under the dormant Commerce Clause and allows states to structure systems of alcohol regulation, including the three-tier distribution system adopted in many states. However, in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276 (1984), the Court held the Twenty-first Amendment does not allow state laws that constitute "mere economic protectionism". This holding protects important state interests in the free flow of commerce and should not be overruled as urged by Michigan and its amici. Otherwise, as historical laws illustrate, protectionism would return in many forms and would have the negative impacts that accompany such barriers.

States with statutory schemes that permit in-state wineries to directly ship alcohol to consumers but restrict similar shipments by out-of-state wineries commonly argue these laws are justified by the limits of their regulatory reach. Michigan and its amici states assert two such bases for its outright ban on out-of-state direct shipments. First, they argue an in-state presence is needed to require out-of-state wineries to collect their sales or use taxes. Second, they argue an in-state presence provides the only effective regulatory hammer if there are illegal sales of alcohol to minors.

With regard to collection of taxes, the Court should dispel the mistaken assumption that a state would not be able to collect taxes on sales of wine by out-of-state shippers. The Court's holding in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), that a state cannot tax a vendor whose only contacts are by mail or common carrier did not address the interplay of the Twenty-first Amendment and the Commerce

Clause. If the choice posed by the interplay of the Twenty-first Amendment and the Commerce Clause is allowing states to impose tax collection responsibilities on out-of-state wineries, or alternatively allowing them to ban direct shipments from these wineries altogether, the value of both provisions obviously is better served by the first alternative. It would be ironic indeed if the *Quill Corp.* holding, based on avoiding undue burdens in interstate commerce, stood as justification for state laws that preclude such commerce altogether. Indeed, several states have adopted laws that require out-of-state shippers to collect and remit state taxes. Dispelling the mistaken assumption that *Quill Corp.* governs wine shipments also removes any doubt about the enforceability of these laws.

With regard to underage access to alcohol, Michigan and its amici suggest that unless a state bans direct shipments from out-of-state wineries such sales will be "virtually unregulated".[1] This claim is countered by the fact a number of states allow direct shipments under successful regulatory programs. Additionally, the claim that only in-state wineries can be deterred from providing wine to minors ignores the circumstances of the direct wine shipment market. Wineries have a significant economic interest in being allowed to sell wine to consumers of other states. There is little risk they would put such direct shipping licenses in peril in order to make incidental sales on those rare occasions when minors would seek to obtain access to

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[1] Br. Amici Curiae Ohio, et al. at 14.

wine through such sales. And in-state controls on deliveries are the same whether the product is from in-state or out-of-state wineries. Further, violations of Michigan laws could have collateral consequences for non-Michigan wineries, since such violations could be a basis for license actions in other states, including a winery's home state. The claim that effective regulation requires an in-state presence is not substantiated in the context of direct wine shipments to consumers for personal use.

ARGUMENT

A. States' Interests Are Not Single-Faceted And Include Both Twenty-First Amendment Authorities And The Nondiscrimination Principle Of The Dormant Commerce Clause

States have an interest in controlling importation of alcohol into the state under the Twenty-first Amendment and also have an interest in the flow of commerce among the states. Consideration of the effect of the Twenty-first Amendment on the operation of the nondiscrimination principle of the dormant Commerce Clause is not a single-faceted "states' rights" issue as some have suggested.[2] Rather, the

[2] *See* Eric L. Martin, *A Toast To The Dignity Of States: What Eleventh Amendment Jurisprudence Portends For Direct Shipment Of Wine*, 31 Hofstra L. Rev. 1303, 1305 (Summer 2003) (concluding that states' prerogatives under the Twenty-first Amendment should not overcome the Commerce Clause's purpose of eliminating economic protectionism in the direct shipment of wine, but observing the Court may view the Twenty-first Amendment as being preeminent because it "implicates the sovereignty of the states").

states have interests that are implicated by each of these provisions and by their interplay.

1. States' Interests Protected By The Twenty-First Amendment

The Twenty-first Amendment enables states to regulate importation of alcohol to a degree that might otherwise be impermissible under the dormant Commerce Clause. Section 2 provides:

> "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. Const. amend. XXI, § 2.

Many states have used their authority under the Twenty-first Amendment to establish a three-tiered system to control the distribution of alcoholic beverages. Under a three-tiered distribution system, alcohol producers provide their product to wholesalers and distributors, who in turn may provide alcohol to retailers, who then sell to consumers. The three-tiered distribution system is generally a way to structure the liquor industry in an orderly market system that serves state interests in preventing alcohol abuse or evasion of taxation. The three-tiered system addresses a concern that if these various tiers were to collapse and be controlled by the same entities, the system would foster organized crime and create incentives to encourage alcohol abuse. *See Dickerson v. Bailey*, 212 F. Supp. 2d 673, 679-80 & n.11 (S.D. Tex. (2002), aff'd, 336 F.3d 388 (5th Cir. 2003). A state has broad authority to regulate alcohol under the Twenty-first Amendment,

and nobody seriously questions that the three-tiered system is constitutional regardless of any incidental burden on interstate commerce. *Cf. North Dakota v. United States*, 495 U.S. 423, 431-33 (1990) (plurality opinion). The three-tiered system is not at issue here.

This dispute is over a regulatory exception from a state's three-tiered system. Many states have recognized that they can meet their regulatory concerns *and* allow direct shipments of wine to consumers, in limited quantities for their personal use. While many states do so without discriminating against out-of-state wineries, Michigan has chosen to except only its own wineries and open Michigan's slice of the personal use wine market to them in a manner that it forbids to out-of-state wineries.

Michigan's discriminatory exception for its own wineries implicates another state interest: the interest in nonprotectionism in commerce.

2. States' Have Strong Interests In Nonprotectionism In Commerce

a. Product Protectionism Has Negative Impacts On The Interests Of The Source States

When the dormant Commerce Clause addresses laws that block the flow of commerce into a state, the affected interests are not just one of state versus federal power, but also of "one state in its dealings with another". *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935). The exercise of state authority under the Twenty-first Amendment demonstrates the different state interests involved. Early Twenty-first Amendment jurisprudence

provided states with virtually unlimited power to prevent imported liquors from competing with domestic liquors on equal terms. *See State Bd. of Equalization v. Young's Market Co.*, 299 U.S. 59 (1936). The opposite side of this coin was that states were virtually powerless to prevent economic protectionism that discriminated against their own breweries or wineries. As summarized by Professor Tribe: "It was long unclear whether the amendment empowered states to regulate importation beyond the degree reasonably necessary to control the level of liquor consumption within the state's boundaries. Some early cases suggested that the state's power extends well beyond such control, even authorizing political trade wars among the states". Laurence H. Tribe, *American Constitutional Law* § 6-24 (3d ed. 2000).

However, in *Bacchus Imports, Ltd.*, the Court held that "[s]tate laws that constitute mere economic protectionism" can violate the Commerce Clause. *Bacchus Imports, Ltd.*, 468 U.S. at 276. A contrary holding, "would revive the spectre of balkanized commerce which haunted the framers and motivated the commerce clause itself". Tribe, § 6-24.

The spectre of protectionism that forecloses some wineries from participating in the national economy presents this concern for wine-producing states. Wine exports contribute substantial economic benefits to these states, particularly in providing employment and a stable economy in rural and agricultural communities. The legislatures of these states have clearly recognized the substantial benefits provided to their residents by wine grape growing and wine production, including sales for

export to other states.[3] Thus, these states have a strong interest in ensuring that laws that prevent the direct shipment of wine to consumers in other states do not constitute "mere economic protectionism". *See Bacchus Imports, Ltd.*, 468 U.S. at 276.

b. Protectionism Would Return In Several Forms If *Bacchus Imports, Ltd.* Were Overruled

Michigan and its amici ask the Court to overrule *Bacchus Imports, Ltd.* Pet'rs Br. at 28-29; Br. Amici Curiae Ohio, et al. 10. They offer no evidence to dispute the *Bacchus Imports, Ltd.* Court's conclusion that "one thing is certain: The central purpose of the provision was not to empower States to favor local liquor industries by erecting barriers to competition." *Bacchus Imports, Ltd.*, 468 U.S. at 276. But if *Bacchus Imports, Ltd.* were overruled, such protectionism would blossom.

History illustrates this point. In the past, a number of states have imposed differential excise taxes on locally produced and imported wines, or

[3] For example, in Wash. Rev. Code § 15.88.010(2), the Washington Legislature declares: "The sale in the state and export to other states and abroad of wine made in the state contribute substantial benefits to the economy of the state, provide a large number of jobs and sizeable tax revenues, and have an important stabilizing effect on prices received by agricultural producers." In Cal. Food & Agric. Code § 74802, the California Legislature finds: "The maintenance and expansion of the winegrape industry of California and of its local, national, and foreign markets is necessary to assure the consuming public of a continuous supply of these products and needed levels of income for those engaged in the winegrape industry in this state."

have provided lower license fees for wineries using domestic agricultural products. *See* Note, *Economic Localism In State Alcoholic Beverage Laws—Experience Under The Twenty-First Amendment*, 72 Harv. L. Rev. 1145, 1151 nn.51-52, 1153 n.69 (1959) (citing statutes that provided preferential excise tax rates for domestic wines, different state-controlled price markups, or lower license fees for wineries using domestic agricultural products). The central principle of *Bacchus Imports, Ltd.* has resulted in the repeal of many of these provisions. For example, a provision of the Michigan Liquor Control Act subjected wines manufactured from grapes or fruits not grown in Michigan to a higher tax rate than that imposed on "all wines manufactured in Michigan from grapes grown in Michigan". Op. Att'y Gen. 161, 1992 WL 573160 *1 (Mich. 1991-1992). In 1992, a Michigan Attorney General Opinion concluded this tax preference discriminated against interstate commerce in violation of the Commerce Clause, citing *Bacchus Imports, Ltd. Id.* at *1-*2.

The holding of *Bacchus Imports, Ltd.* is sound and protects the free flow of commerce without undercutting any of the purposes of the Twenty-first Amendment. If a state law is upheld on the basis of the Twenty-first Amendment, it should be based on regulatory needs rather than protectionism.

B. Michigan's Asserted Regulatory Interests In Discriminating Between In-State And Out-Of-State Wineries In The Context Of Direct Wine Shipments Are Not Substantiated

Michigan asserts two regulatory interests in support of its ban on out-of-state direct wine

shipments: revenue collection and preventing underage access to alcohol by requiring an in-state presence. However, its central concern with regard to revenue collection is based on a misassumption that a state lacks the authority to require out-of-state wineries to collect its taxes on wine sales. Further, its assertion that only in-state wineries can be prevented from providing wine to minors is unsubstantiated.

1. Restrictions On Out-Of-State Direct Wine Shipments Are Not Necessary To Prevent Tax Evasion Because The Analysis Of *Quill Corp.* Is Inapplicable To Alcohol Sales

Michigan claims that the ban on direct shipment by out-of-state wineries to consumers in that state is necessary to accomplish that state's legitimate concern of tax collection. Similarly, its amici Ohio suggests that "in a direct-shipping world, the State may have no way to collect a sales tax from the winery at all. *See Quill Corp. v. North Dakota*, 504 U.S. 298, 315-18 (1992)."[4] Br. Amici Curiae

[4] Others have made this same assumption. *See Bolick v. Roberts*, 199 F. Supp. 2d 397 (E.D. Va. 2002) (citing *Quill Corp.* for proposition that Virginia had no right to collect sales taxes from out-of-state entities for delivery of wine directly to Virginia consumers), *order vacated as moot by Bolick v. Danielson*, 330 F.3d 274 (4th Cir. 2003); Stuart M. Maxey, *Sour Grapes: Reflections On The Circuit Split On Direct Shipment Of Wine, The Commerce Clause, And The 21st Amendment*, State Tax Notes 45, 51 (July 5, 2004) (arguing the state would not be able to tax an out-of-state direct shipper of alcohol if *Quill Corp.* applies, and therefore "the discriminatory ban would seem to implicate the core concern of revenue raising and would be saved under the *Bacchus* . . . approach"). Some have adopted a different assumption—that out-of-state shippers could be required to collect taxes. *See Bainbridge v. Turner*, 311 F.3d 1104, 1115 (11th Cir. 2002) ("Why, exactly, must Florida engage in this discriminatory scheme to effectuate its desire to raise revenue? What is so unique about the geographic location of out-of-state wineries that makes taxing them so difficult that they are forced (unlike their in-state counterparts) into the three-tier distribution system? After all, in-state wineries are taxed directly, and this alternative therefore appears to be a viable substitute to the three-tier taxation scheme. So why can't out-of-state firms be taxed directly, just like in-state wineries?" (Footnote omitted.)); Lloyd C. Anderson, *Direct Shipment Of Wine, The Commerce Clause And The Twenty-First Amendment: A Call For Legislative Reform*, 37 Akron L. Rev. 1, 36 (2004) (out-of-state vendors as a condition of direct shipping could, as an additional condition, be required to collect and remit state taxes now collected by wholesalers and retailers).

Ohio, et al. at 25. These arguments are based on the flawed assumption that Michigan lacks the authority to require out-of-state wineries to collect its sales or use taxes.

In *Quill Corp.*, the Court adopted a bright-line rule that the Commerce Clause required a business to have a substantial nexus with a state beyond contacts by mail or common carrier before the state could require the business to collect its sales or use taxes. *Quill Corp.*, 504 U.S. at 313-16. On its face, *Quill Corp.* did not apply to interstate shipment of alcohol and its application is manifestly dubious in that context.

The rule of *Quill Corp.* was established for the explicit purpose of removing impediments to interstate commerce. The Court observed that "[u]ndue burdens on interstate commerce may be avoided not only by a case-by-case evaluation of the

actual burdens imposed by particular regulations or taxes, but also, in some situations, by the demarcation of a discrete realm of commercial activity that is free from interstate taxation." *Quill Corp.*, 504 U.S. at 314-15. Such a bright-line rule is appropriate under the Commerce Clause because it "fosters investment by businesses and individuals". *Id.* at 316. The Court noted: "Indeed, it is not unlikely that the mail-order industry's dramatic growth over the last quarter century is due in part to the bright-line exemption from state taxation created in *Bellas Hess*." *Id.*

Given the rule's underpinnings, it would be illogical and ironic were the rule used to justify protectionism. Instead of fostering interstate commerce, the inability to tax would justify limits on such commerce.[5] Furthermore, *Quill Corp.'s* rationale is substantively undermined in this context by the fact that the Twenty-first Amendment uniquely empowers a state to "burden" the importation of alcohol into the state to some degree, so long as that "burden" is not "mere economic protectionism". *Bacchus Imports Ltd.*, 468 U.S. at 276.

In this case, permitting Michigan to impose its taxes on out-of-state wineries fulfills the values of both the Twenty-first Amendment and the

[5] One commentator has suggested that a state would use *Quill Corp.* to justify a ban on direct shipping. "Under the *Bacchus* two-step approach, a state should argue that its core concern is revenue raising, and that under *Quill*, it cannot tax an out-of-state direct shipper; therefore, the state's only reasonable alternative is to ban direct shipping." Maxey, at 51.

Commerce Clause. Allowing tax collection meets Michigan's legitimate concerns about state revenue. It also fulfills the values of the Commerce Clause by increasing the flow of interstate commerce. It makes little sense to conclude that limits on extraterritorial tax collection implicates the Twenty-first Amendment and empowers a state to ban all direct interstate shipping—a ban that would otherwise violate the Commerce Clause—on the grounds the Commerce Clause does not authorize a state to impose a tax collection responsibility on an out-of-state seller.

Indeed, a number of states have imposed tax collection or payment responsibilities on out-of-state shipper licensees. *See* N.H. Rev. Stat. Ann. § 178:27(V) ("Direct shippers shall file invoices for each shipment with the liquor commission showing the retail price of the product, and shall pay a fee of 8 percent of the retail price for shipments of liquor, wine, beer, or beverage to the commission."); N.C. Gen. Stat. § 105-113.83(b) ("The excise taxes levied under G.S. 105-113.80(b) on wine shipped directly to consumers pursuant to G.S. 18B-1001.1 must be paid by the wine shipper permittee."); Wyo. Stat. Ann. § 12-2-204(d)(v) (out-of-state shippers of manufactured wine must remit a tax of twelve percent of the retail price for each shipment of manufactured wine to the liquor division); S.C. Code Ann. § 61-4-747(C)(4) (out-of-state shipper must pay all sales taxes and excise taxes due on sales to residents of the state, with the taxes to be calculated as if the sale were made in the state at the location where delivery is made). States that require out-of-state permittees to collect and remit taxes on direct

shipments reported few or no problems with tax collection when asked about their experiences in an FTC survey. FTC staff summarized some of the responses:

> "Nebraska, for example, reports that they 'have also not, as yet, had any problems with the collection of excise taxes.' North Dakota reports that 'Taxes are collected. No problems to date that we are aware of.'" Prepared Statement Of The Federal Trade Commission Before The Subcommittee On Commerce, Trade, And Consumer Protection Committee On Energy And Commerce United States House Of Representatives, October 30, 2003 (footnote omitted), found at http://www.ftc.gov/os/2003/10/031030ecommercewine.htm.

The New Hampshire Liquor Commission reported that it collects an eight percent fee and that "[w]hen the NH Liquor Commission discovers an improper shipment we contact the company and inform them of the laws in NH. Once the company learns of NH laws they normally get a permit or stop shipping into NH." Federal Trade Commission, Staff Report, *Possible Anticompetitive Barriers To E-Commerce: Wine* 38 (July 2003), found at www.ftc.gov/os/2003/07/winereport2.pdf (FTC Report). In fiscal year 2002, $91,716 was collected for shipments for personal use into New Hampshire. FTC Report, App. B, FTC Questionnaire To States, New Hampshire Letter.

2. The Asserted Need For An In-State Presence To Prevent Sales To Minors By Wineries Is Not Substantiated

a. While Protecting Minors Is A Matter Of Serious Concern, A Threshold Question Is Whether A Ban On Out-Of-State Shipments Serves That Interest

Underage access to alcohol is a matter of serious concern. Michigan does indeed have an interest in protecting minors, as all states do, and this interest falls within the Twenty-First Amendment. A threshold question, however, is whether Michigan's discriminatory bar against out-of-state wineries, but not its own, serves that interest. On this record, Michigan's interests are unsubstantiated and, thus, fail even to present a conflict between the Twenty-First Amendment and the dormant Commerce Clause. *Cf. 324 Liquor Corp. v. Duffy*, 479 U.S. 335, 349-51 (1987) (scrutinizing the record to determine whether state's alleged interest under Twenty-First Amendment was substantiated).[6]

b. Michigan And Its Amici Understate The Deterrence Value Of State Regulations Regarding The Direct Sale Of Wine To Consumers By Out-Of-State Wineries

Michigan and its amici contend that states have inadequate means to enforce their liquor

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[6] This is not to say there would not be situations in which the regulatory purposes served by an in-state presence requirement could be supported, such as a substantiated need to hold or inspect the product in-state.

regulations against out-of-state wineries. Pet'rs Br. at 33; Br. Amici Curiae Ohio, et al. at 10. Amici Ohio, et al., go so far as to state:

> "States have only two choices: restrict direct shipments by out-of-state wineries or leave this potentially dangerous product virtually unregulated as long as it is shipped directly to a consumer from out of state." Br. Amici Curiae Ohio, et al. at 14.

Of course, this statement is belied by the fact a number of states allow direct shipments under regulations that have proved to be components of a successful regulatory program.

Recent studies of the direct wine shipments and underage access reflect some of the reasons such regulatory programs are successful. The effectiveness of deterrence for commercial activity is derived from examining the costs of noncompliance as compared to the potential benefits of noncompliance. *See* Timothy F. Malloy, *Regulation, Compliance And the Firm*, 76 Temp. L. Rev. 451, 453-54 (Fall 2003).[7] Commercial entities are effectively deterred from engaging in activity where the costs exceed the benefits. Wineries have much to lose and little to gain from noncompliance with regulations concerning sales to minors. Wineries need a market for their product, and direct shipment

[7] Some scholars have noted that a firm's compliance decisions can also be influenced by the firm's drive to obey the law, sometimes called the "compliance norm", and that expanded outreach and education efforts are methods that appeal to the regulated community's law abiding nature. Malloy, 76 Temp. L. Rev. 451 at 455.

to consumers is the only meaningful access for small wineries. The risk of losing access to that market through the loss of a shippers' license to out-of-state markets far outweighs any benefit they would receive by selling wine to minors. Further, violations of one state's laws regarding sales to minors could have collateral consequences for licenses in other states, adding a further measure of disincentive to violate a direct shipper's license.

Certainly, deterrence of future violations is an important function of a state regulatory scheme. But a claim of inadequate deterrent regulatory reach must be examined in the concrete context of the particular interests and penalties faced by the potential violators. Here, that context involves wineries that make direct shipments, in limited quantities, to consumers for their personal use. Michigan's categorical ban as a means of securing compliance with its alcohol shipping laws unreasonably discounts (1) the limited potential benefit to a winery from engaging in conduct that would result in shipments to minors; (2) the importance of out-of-state markets to the small winery, and thus the severity of the consequence of losing a shippers' license; and (3) the range of legal consequences that suspension or discipline of a Michigan shipper's license could have for a non-Michigan winery.

(1) The In-State Or Out-Of-State Origin Of Direct Wine Shipments Does Not Make A Difference In The Efficacy Of Regulatory Efforts To Limit Underage Access To Alcohol

Several features of direct wine shipments make them an unlikely source for minors seeking to evade laws limiting their access to alcohol.[8] Direct shipment of wine to consumers generally involves "high-end, expensive wines". FTC Report at 27. The product of small vineyards and wineries is necessarily more expensive to produce, and shipments of bottles or individual cases is necessarily a more expensive shipping method. Such purchases also involve a waiting period while the product is shipped, rather than instant access to the wine. As noted in the FTC Report, "[m]inors would have to pay a hefty premium, from 33-83%, to purchase a bottle of wine costing less than $20 online and have it delivered to them via 2nd Day Air." FTC Report at 33. One commentator observed that the expense and delay in delivery associated with direct wine shipments make this an unattractive avenue for underage access.

> "Moreover, it seems disingenuous to claim that a minor who wishes to obtain alcohol would order expensive wine or beer and wait several

[8] In 1997 testimony before the California Legislature, the Chief Deputy Director of the California Department of Alcoholic Beverage Control stated that, in the preceding 20-year period, the Department had never received a complaint about an underage person receiving wine by direct shipment. *See* FTC Report at 32 tbl.3, App. B, FTC Questionnaire To States, California Testimony at 54-55.

> days for shipment. While 'skipping the middleman' is usually equated with lower prices, consumers who rely on direct shipments do not do so to save money. Directly-shipped wines tend to be more expensive because the purchasers, usually wine connoisseurs, rely on direct shipping to obtain rare wines produced by small wineries. The evidence simply does not bear out the claims of the proponents of direct shipment restrictions." Vijay Shanker, *Alcohol Direct Shipment Laws, The Commerce Clause, And The Twenty-First Amendment*, 85 Va. L. Rev. 353, 359 (Mar. 1999) (footnotes omitted).

Despite the limited appeal to minors of direct wine sales, regulation to prevent underage access is important, and appropriate laws have been put in place by all states that allow intrastate or interstate shipments of wine to consumers. Michigan law requires recorded verification from the individual placing the order by obtaining from him or her an affirmation that he or she is of legal age to purchase alcoholic liquor and that the wine be shipped in a container that "clearly establishes in a prominent fashion that the package contains alcoholic liquor and that the recipient at the time of the delivery is required to provide identification verifying his or her age along with a signature". Mich. Comp. Laws Ann. § 436.1203(2)(f). Michigan considers such measures sufficient to deter minors from ordering in-state wine for direct shipment.

Out-of-state wineries can be required to follow precisely the same procedures and shipping requirements that Michigan requires of its own

producers and shippers. Certainly the in-state or out-of-state origin of the direct shipments does not make a difference to a minor intent on obtaining alcohol, as noted by one commentator:

> "If keeping children from ordering alcoholic beverages online is the true reason for prohibiting direct shipment of wine, then it should not matter whether the wine is being ordered from within or out of the state. Certainly, one cannot imagine it mattering to the children doing the ordering." Susan Lorde Martin, *Wine Wars—Direct Shipment Of Wine: The Twenty-First Amendment, The Commerce Clause, And Consumers' Rights*, 38 Am. Bus. L.J. 1, 7 (Fall 2000).

Whether in-state or out-of-state, Michigan has the ability to require the shipper and delivery service to determine if the purchaser or designated recipient is of legal age and to require labeling on the shipping boxes ensuring the delivery is not to a minor. Michigan could impose such requirements on out-of-state shipments and could take regulatory action against either the out-of-state winery or the shipping company, or both.

(2) A Shipper's License That Allows Access To Markets In Other States Is A Significant Benefit To Small Wineries And Potential Loss Of The License Is A Strong Deterrent To Violations

Michigan argues that an out-of-state winery would not be sufficiently deterred by the possibility of suspension of a Michigan license. It argues that out-of-state suppliers have little incentive to prevent

sales to minors because it can threaten an out-of-state winery with only the loss of a small part of its market, not the loss of a license to produce wine. But this assertion ignores the economic realities faced by small wineries. These small wineries need access to direct consumer markets in other states to be viable.

> "So-called boutique wineries with relatively few cases of wine to sell cannot have a regular network of distributors the way that large producers of alcoholic beverages do. They must rely on selling directly to consumer aficionados. . . .
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> "Most of the wineries in this country, ninety percent of which are located in California, can be characterized as small family farms. They have a small output, typically between a few hundred to a few thousand cases of wine a year; they do not have shelf space; they do not have budgets for advertising or wholesale distributors or even enough product to warrant those things. Furthermore, from a high of over 20,000, there are now fewer than 400 liquor distributors and wholesalers, and their typical retail store customer has only about fifty wines available out of the more than 10,000 produced in this country. Of the approximately 900 wineries in California, only about 150 have national distributors. A wine industry consultant has asserted that the old-style, national distributorship system works well for wineries selling 100,000 cases at

under seven dollars a bottle, but it does not work for wineries selling 500 cases at thirty dollars a bottle." Susan Lorde Martin, 38 Am. Bus. L.J. at 2-4 (footnotes omitted).[9]

If consideration of the interplay of the Commerce Clause and the Twenty-first Amendment occurs in the "context of the issues and interests at stake in any concrete case", *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332 (1964), then the importance of out-of-state markets to small wineries must be considered in evaluating the effectiveness of the regulatory measures available to the states. From the perspective of the regulated winery, access to out-of-state consumers is important, and the threat of a license suspension is a strong deterrent.

(3) Michigan's Outright Ban Unreasonably Discounts The Collateral Consequences An Out-of-State Winery Could Suffer For Violation Of Michigan's Laws

Shipping wine in contravention of a state's laws designed to prevent underage access to alcohol could also put a non-resident winery's license at risk in its home state or affect its ability to obtain direct

[9] The geographic distribution of wineries has changed since this article was written in 1999. California remains the premier winegrowing state, but more recent publications indicate that roughly half the nation's wineries are located in California, due to development of wineries in other states. *See* Eric L. Martin *A Toast To The Dignity Of States: What Eleventh Amendment Jurisprudence Portends For Direct Shipment Of Wine*, 31 Hofstra L. Rev. 1303, 1305 (Summer 2003).

shipment licenses from other states. For example, many states require licensed wineries to clearly mark shipping packages to indicate that delivery will not be made to a minor or to an intoxicated person, whether the package is shipped in-state or out-of-state.[10] Violation of such a state law would be the

[10] *See, e.g.*, Cal. Bus. & Prof. Code § 23661.2(b) ("The shipping container of any wine sent into or out of this state under this section shall be clearly labeled to indicate that the package cannot be delivered to a minor or to an intoxicated person."); Colo. Rev. Stat. Ann. § 12-47-104(1) ("The shipping container of any vinous liquors sent into or out of this state under this section shall be clearly labeled to indicate that the package cannot be delivered to a minor."); Idaho Code § 23-1309A(3) ("The shipping container of any wine sent into or out of this state under this section must be clearly labeled to indicate that the container contains alcoholic beverages and cannot be delivered to a person who is not at least twenty-one (21) years of age."); 235 Ill. Comp. Stat. 5/6-29(b) ("The shipping container of any wine sent into or out of this State under this Section shall be clearly labeled to indicate that the package cannot be delivered to a person under the age of 21 years."); Mo. Rev. Stat. § 311.462(2) ("The shipping container of any wine sent into or out of this state under this section shall be clearly labeled to indicate that the package cannot be delivered to a person under the age of twenty-one years or to an intoxicated person."); N.M. Stat. Ann. § 60-7A-3(E) ("The shipping container of any wine sent into or out of this state under this subsection shall be labeled clearly to indicate that the package cannot be delivered to a minor or to an intoxicated person."); Or. Rev. Stat. § 471.229(3) ("The shipping container of any wine or cider sent into or out of this state under this section must be clearly labeled to indicate that the container contains alcoholic beverages and cannot be delivered to a person who is not at least 21 years of age or to a person who is visibly intoxicated."); Wash. Rev. Code § 66.12.200 ("The shipping container of any wine sent into or out of this state under RCW 66.12.190 shall be clearly labeled to indicate that the package cannot be delivered to a person under twenty-

basis for action on the license issued by the home state. Additionally, some states have explicit provisions requiring licensees to comply with the laws of other states.[11] Some states require licensees to show their licensing, including relicensing, is in the public interest.[12] Violations of shipping laws of other states designed to protect minors would be relevant to licensing decisions based on this standard. Actions in violation of a direct shippers' license in one state may also put at risk the ability of the winery to obtain a license to ship to another

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one years of age or to an intoxicated person."); W. Va. Code § 60-8-6(b) ("The shipping container of any wine sent into or out of this state under this subsection shall be clearly labeled to indicate that the package cannot be delivered to any person under the age of twenty-one or to an intoxicated person.").

[11] Del. Code Ann. tit. 4, § 104(a), (b) ("No sale of alcoholic liquor shall be made to a person in a state or a division of a state where such sale is prohibited by law."; "No shipment of alcoholic liquor shall be made into a state or into a division of a state where such shipment is prohibited by law."); N.H. Rev. Stat. Ann. § 178:27(VIII) ("Upon notification by authorities in another state which imposes a reciprocal enforcement policy, a New Hampshire licensee proved to be making illegal direct shipments to consumers and licensees in said state shall be subject to action by the liquor commission. Such actions may include fines and suspension and revocation of New Hampshire liquor licenses.").

[12] *See, e.g., Fueston v. City of Colorado Springs*, 713 P.2d 1323 (Colo. Ct. App. 1985) (documentation from Washington State Liquor Control Board indicating that licensee was associated with bar in that state whose license was cancelled supported nonrenewal of Colorado license under statute that prohibited anyone from holding a liquor license unless his "character, record, and reputation" are satisfactory to the licensing authority).

state.[13] Indeed, a state can ensure that violations of its regulations will not go unnoticed by other jurisdictions.[14]

An additional deterrent is the Federal Alcohol Administration Act, chapter 8 under U.S.C. Title 27. Under this federal law, a basic permit is required to engage in the business of distilling spirits or producing wine. Basic permits are conditioned upon compliance "with the twenty-first amendment and laws relating to the enforcement thereof". 27 U.S.C. § 204(d). Consequently, the Alcohol And Tobacco Tax And Trade Bureau (formerly the Bureau Of Alcohol, Tobacco And Firearms) could take administrative action against a basic permit if a

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[13] Ariz. Rev. Stat. § 4-203.04(C) ("The director may refuse to issue a direct shipment license for good cause. After a hearing, the director may suspend or revoke a direct shipment license for good cause. The director shall not issue a direct shipment license to any person who: 1. Has had a direct shipment license or any license to deal in spirituous liquor revoked in this state or any other state within one year preceding the application.").

[14] *See* La. Rev. Stat. Ann. § 26:359(G) ("Upon determination by the secretary of the Department of Revenue that an illegal sale or shipment of alcoholic beverages has been made to a consumer in Louisiana by either a manufacturer or retailer of such alcoholic beverages, the secretary shall notify both the Bureau of Alcohol, Tobacco, and Firearms of the United States Department of the Treasury and the licensing authority for the state in which the manufacturer or retailer is domiciled that a state law pertaining to the regulation of alcoholic beverages has been violated and shall request those agencies to take appropriate action.").

winery were to ship products into a state in violation of that state's laws.[15]

CONCLUSION

The judgment of the Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

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[15] See ATF Industry Circular No. 96-3, *Direct Shipment Sales Of Alcohol Beverages* (Feb. 11, 1997), found at http://www.atf.gov/pub/ind_circulars/ic_96-3.htm, discussed in the FTC Report at page 10.

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Nos. 03-1116, 03-1120

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In The
Supreme Court of the United States

JENNIFER M. GRANHOLM, Governor, et al.,

Petitioners,

v.

ELEANOR HEALD, et al.

MICHIGAN BEER & WINE WHOLESALERS ASSOCIATION,

Petitioner,

v.

ELEANOR HEALD, et al.

On Writs Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR THE CARGO AIRLINE ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*

The Cargo Airline Association (CAA) is a trade association of fifteen interstate air carriers and motor carriers affiliated with air carriers through common controlling interest, including United Parcel Service and FedEx Express, which transport only cargo.[1]

Cargo transportation is the engine that drives the nation's interstate commerce. It is critically important to the economy. As of the last economic census, for-hire air and motor carriers transported more than 3.6 billion tons of goods, valued in excess of $4 trillion. *See* U.S. Census Bureau, U.S. Dep't of Commerce, *2002 Economic Census: Transportation: 2002 Commodity Flow Survey: United States (Preliminary)*, at 8 tbl. 1a (2003).

Carriers are able to provide the timely, efficient, and reliable service on which the modern economy relies only by employing uniform processes for handling, transporting, and delivering packages. It is therefore critical to the effective functioning of carriers' delivery operations that those operations be subject to uniform, national laws throughout the United States, as Congress has directed in the Federal Aviation Administration Authorization Act of 1994 (FAAAA), Pub. L. No. 103-305, tit. VI, § 601, 108 Stat. 1569, 1605-1607. *Amicus* CAA's members, and their customers, bear the burdens of divergent state laws that seek to regulate carriers' delivery of specific items.

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[1] A letter from the parties consenting to the filing of this brief has been filed with the Clerk of this Court, pursuant to Supreme Court Rule 37.3(a). No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

The Michigan laws at issue in these cases, and the New York laws at issue in *Swedenburg v. Kelly*, No. 03-1274, directly regulate carriers' deliveries. Because *amicus* CAA's members depend on nationally-uniform rules in operating their businesses, the CAA has a significant interest in the outcome of these cases.

SUMMARY OF ARGUMENT

The state laws at issue in these cases regulate not only the buyers and sellers of wine, but also the carriers that transport the wine, along with other goods, to and within Michigan. These laws directly regulate carriers by proscribing delivery of alcohol to unauthorized recipients. The parties apparently assume that the federal rights of carriers are derivative of and coextensive with those of the buyers and sellers. But that assumption is in error. Carriers have been afforded special protection from state regulation by federal statute, as well as under this Court's Commerce Clause jurisprudence.

Although the Michigan laws regulating carriers at issue in these cases are invalid, many of *amicus* CAA's members offer shippers the option of requiring an adult signature for delivery. Moreover, the federal government remains available to address any untoward conduct by carriers.

A. The Federal Aviation Administration Authorization Act of 1994 (FAAAA), Pub. L. No. 103-305, tit. VI, § 601, 108 Stat. 1569, 1605-1607, is critical to the proper resolution of these cases. The FAAAA preempts state laws "related to a price, route, or service" of air and motor carriers that transport property. The judgment below should be affirmed on the ground that the Michigan laws at issue are preempted by the FAAAA.

Congress enacted the FAAAA to reaffirm and expand its earlier preemption of state laws regulating air carriers in the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705. Congress enacted the FAAAA's preemption provisions because it determined that the existing patchwork of state regulation of carrier operations "imposed an unreasonable burden on interstate commerce." FAAAA § 601(a)(1), 108 Stat. at 1605.

The FAAAA preempts Michigan's laws regulating carriers' deliveries. A carrier's delivery of the property it transports is a core part of the carrier's "service," which cannot be regulated by state or other local laws. The state laws also relate to a carrier's routes because compliance requires special routing of packages containing alcohol, including re-routing of non-complying packages to be returned to shippers, and may require changes to delivery drivers' routes to account for the increased amount of time necessary to conform to restrictions on the manner of deliveries. Finally, these laws relate to a carrier's prices because the costs of compliance can substantially increase the costs for carriers to transport and deliver goods.

The Twenty-first Amendment does not invalidate the FAAAA. Congress enacted the FAAAA's preemption provisions pursuant to its Article I power to regulate interstate commerce. This Court has held in three cases that federal statutes enacted pursuant to the Commerce Clause preempted state laws regarding alcohol despite claims by the States that the Twenty-first Amendment authorized the laws. *See California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987); *Capital Cities Cable v. Crisp*, 467 U.S. 691 (1984). While there is language in these cases that suggests the Court was seeking to "balance" federal and state interests, this balance appears no different from standard application of the

Supremacy Clause, in which the federal government must prevail. Certainly, if, as in *Crisp*, a federal policy in favor of access to cable television can trump a State's interest in promoting temperance, then a federal policy in favor of unfettered national commercial markets for the transportation of property likewise must supercede state laws that are motivated by a combination of temperance and economic protectionism. To hold otherwise would draw into question not only the FAAAA, but also other federal laws, such as recently enacted public-safety legislation designed to reduce the number of bulky packages that passengers carry onto airplanes by authorizing the direct shipment of on-site purchases of wine to consumers who could have lawfully carried the wine into the State. *See* 27 U.S.C. § 124.

Nothing in the Twenty-first Amendment's legislative history reflects an intent to limit Congress's authority to regulate commerce pursuant to the Commerce Clause. To the contrary, the debates show that Congress's rejection of a proposed Section 3 of the Amendment, which would have granted it express authority to regulate the sale of liquor on the premises where sold, was based in part on the understanding that Congress's existing authority to regulate liquor under the Commerce Clause was not affected.

B. If the Court does not reach the FAAAA preemption argument, the judgment below should be affirmed on respondents' claim that the Michigan laws' facial discrimination against out-of-state products falls within the Dormant Commerce Clause's virtually *per se* rule of invalidity. Moreover, claims under the Dormant Commerce Clause involving undue burdens on interstate commerce should not be foreclosed in cases such as these involving state regulation of the delivery of alcohol.

This Court has never adopted the view, urged by petitioners, that state laws regarding the transportation of

liquor can never be invalidated under the Dormant Commerce Clause, regardless of the burden on interstate commerce. To the contrary, this Court has held that nothing in the text of Section 2 of the Twenty-first Amendment exempts state laws from Dormant Commerce Clause scrutiny. *See Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984); *Healy v. Beer Inst.*, 491 U.S. 324 (1989). The Court should not retreat from these holdings.

Even if this Court were to reject respondents' claims of unconstitutional discriminatory treatment, serious questions would remain concerning the constitutionality of the burden that state laws regulating deliveries of alcohol impose on interstate carriers under the Dormant Commerce Clause. This Court has long recognized that the Clause's proscription against economic balkanization is often violated by state laws directly regulating interstate carriers' transportation of property, a determination confirmed by Congress in enacting the FAAAA.

Michigan's laws can impede the flow of interstate commerce because they disrupt carriers' operations, increase costs, and slow service. Several States forbid carriers from making certain deliveries of alcohol either to unauthorized recipients or from unlicensed shippers, with the determination of who is unauthorized or unlicensed varying among the States. The inefficiencies and delays caused by such state laws may constitute an undue burden on interstate commerce in violation of the Commerce Clause that could not be sustained unless supported by important state interests that justify the burden. Nothing in the Twenty-first Amendment requires this Court to sanction unlimited balkanization of the national market when the product being carried is alcohol.

ARGUMENT

Petitioners, Michigan state officials and a trade association of Michigan beer and wine wholesalers, ask this Court to uphold state laws that regulate not only the buyers and sellers of wine, but also directly regulate carriers (including trucks and aircraft) that transport the wine, along with other goods, to and within Michigan. The Michigan laws restrict the "delivery" of alcohol to state licensees and forbid "delivery" to an individual under most circumstances. Mich. Comp. Laws § 436.1203(1). Even when they do allow direct delivery to individuals, the laws require "[t]he person who delivers the alcoholic liquor" to "verify that the individual accepting delivery is of legal age" through a "diligent inquiry," which is defined to include "at least an examination of an official Michigan" drivers' license or identification card "or any other bona fide picture identification which establishes the identity and age of the person." Mich. Comp. Laws § 436.1203(4), (8)(f). The laws are enforced through criminal penalties against delivery persons and others. *See* Mich. Comp. Laws §§ 436.1909, 436.1701(1).

The New York state laws that are before the Court in the companion case consolidated for argument, *Swedenburg v. Kelly*, No. 03-1274, likewise directly regulate carriers by forbidding a "common carrier or other person" from "bring[ing] or carry[ing] into the state any alcoholic beverages, unless the same shall be consigned to a person duly licensed hereunder to traffic in alcoholic beverages." N.Y. Alco. Bev. Cont. § 102(d).

The constitutional challenge in this action was brought by persons who wish to buy wine from sellers outside of their State and the out-of-state sellers who wish to sell and ship directly to those persons. None of the parties addresses the carriers who transport the wine from the sellers to the buyers, or the provisions of the

challenged state laws that directly regulate carriers' deliveries of wine purchased from the out-of-state sellers. The parties apparently assume that the federal rights of carriers are derivative of and coextensive with those of the buyer and seller. But that assumption is in error. Carriers have been afforded special protection from state regulation by federal statute, as well as under this Court's Commerce Clause jurisprudence.

Although the Michigan laws regulating carriers at issue in these cases are invalid, many of *amicus* CAA's members offer shippers the option of requiring an adult signature for delivery. *See* Federal Trade Comm'n, *Possible Anticompetitive Barriers to E-Commerce: Wine* 36-37 (2003).

Moreover, the federal government remains available to address any untoward conduct by carriers. Despite broad federal deregulation, air carriers must obtain from the federal government a certificate authorizing air transportation before providing interstate cargo service. *See* 49 U.S.C. § 41101(a). The federal government may impose such terms on the certificate as are in the public interest, *see id.* §§ 41103(c), 41109(a)(2)(A), with certain exceptions regarding pricing, scheduling, destinations, and the like, *see id.* §§ 41103(c), 41109(a)(2)(B); *see also id.* § 40101(a)(6), (b)(2) (describing the deregulatory market-based purposes government must consider in assessing the public interest). The federal government has also established an administrative mechanism to police "unfair" or "deceptive" practices by air carriers while allowing them to engage in interstate commerce governed by national rules. *See* 49 U.S.C. § 41712; *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 228 n.4 (1995).[2]

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[2] The federal government also regulates those entities that produce and ship alcohol. *See* 27 U.S.C. §§ 203, 205. Accordingly, the States need not regulate the carriers that transport and deliver the shipments

(Continued on following page)

A. The FAAAA, As An Exercise Of Congress's Authority Under The Interstate Commerce Clause, Preempts State Laws That Regulate The Prices, Routes, Or Services Of Carriers Of Property, Including Laws That Regulate Deliveries Of Alcohol

Federal law exclusively governs carriers' transportation of property by land and air in both interstate and intrastate commerce. Congress enacted the Federal Aviation Administration Authorization Act of 1994 (FAAAA), Pub. L. No. 103-305, tit. VI, § 601, 108 Stat. 1569, 1605-1607, to create and encourage an efficient and competitive national market for the transportation of goods. The FAAAA preempts state laws related to the prices, routes, or services of air carriers, motor carriers, and intermodal carriers (*i.e.*, carriers that use a combination of both air and motor transportation) that transport property. *See* 49 U.S.C. §§ 41713(b)(4)(A), 14501(c)(1). The FAAAA is critical to the proper resolution of these cases because it reflects Congress's determination that States should be divested of virtually all authority to regulate the commercial transportation of property, including the deliveries of wine purportedly regulated by the state laws at issue in these cases. The judgment below should be affirmed on the ground that the Michigan laws at issue are preempted by the FAAAA.[3]

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because the federal government already regulates the terms upon which entities are permitted to ship alcohol and can adjust such regulation to address other concerns.

[3] Although the parties did not raise this statutory preemption argument below, this Court has the authority to consider it. *See Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 382 n.6 (1983). Indeed, it is particularly appropriate to address the statutory preemption argument because the question presented involves the Dormant Commerce Clause and "the relationship between legislative and judicial enforcement of the Commerce Clause is close." *Ibid.*; *see also Boynton v. Virginia*, 364 U.S. 454, 457 (1960) (electing to

(Continued on following page)

1. Congress Enacted The FAAAA To Eliminate A Patchwork Of State Laws Regulating Carriers That It Determined Unreasonably Burdened Interstate Commerce

Congress's decision in the FAAAA to preempt state regulation of the prices, routes, and services of air, motor, and intermodal carriers of property is rooted in a long history of federal supremacy in this field. Starting with the creation of the Interstate Commerce Commission (ICC) in 1887, *see* Act of Feb. 4, 1887, ch. 104, 24 Stat. 379, the federal government has been responsible for regulating the prices, routes, and services of the interstate carriage of goods, to the exclusion of state authorities.[4]

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resolve case based on federal preemption claim not raised by petitioner rather than the Dormant Commerce Clause claim upon which *certiorari* had been granted). Moreover, by addressing the statutory question, this Court may not need to address the constitutional issue of the interplay between the Twenty-first Amendment and the Dormant Commerce Clause. *See Fry v. United States*, 421 U.S. 542, 546 (1975) (addressing statutory issues raised in *amicus* briefs but not by petitioner "rather than decide a constitutional question").

This Court adopted a similar course in *Capital Cities Cable v. Crisp*, 467 U.S. 691 (1984), where, at the urging of an *amicus*, it declined to address a First Amendment claim regarding state regulation of alcohol advertising on cable television resolved by the court of appeals and raised by petitioners in their petition for *certiorari*. The Court instead disposed of the case against petitioners on statutory preemption grounds, even though it was not passed upon by the lower courts and even though the Court was required to address the scope of the Twenty-first Amendment in doing so. *Id.* at 697.

[4] Congress created the ICC to regulate railroads in response to this Court's decision in *Wabash, St. Louis and Pacific Railway Co. v. Illinois*, 118 U.S. 557 (1886), which held that a state law that attempted to regulate the intrastate portion of a railroad's transportation of goods intended for another State violated the Dormant Commerce Clause. The ICC statute was extended in 1935 to apply to trucks and other interstate motor carriers transporting property for compensation. *See* Motor Carrier Act of 1935, Pub. L. No. 255, § 217, 49 Stat. 543, 560-561. A similarly exclusive federal regulatory regime was later established for

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Over time, Congress favored less regulation of air and motor carriers of property, determining that interstate commerce would be more efficient if transportation of goods was governed primarily by competition in the marketplace. Therefore, by 1978, Congress had eliminated most federal regulation of air transportation, and had freed air carriers, including air cargo carriers, from state regulation of *intrastate* price, routes, and services. *See* Airline Deregulation Act of 1978 (ADA), Pub. L. No. 95-504, §§ 4, 37(a), 40(a), 92 Stat. 1705, 1707-1708, 1741, 1744-1745; *Hughes Air Corp. v. Public Utilities Comm'n*, 644 F.2d 1334, 1341 (9th Cir. 1981).

Although Congress had also substantially deregulated interstate motor carriers of property, state regulation of intrastate ground transportation initially remained in place after the ADA. In 1994, however, Congress determined that it was necessary to extend express preemption of state laws related to the prices, routes, or services of carriers engaged in the intrastate transportation of property, whether by ground, air, or some combination thereof, because of the adverse effects such state laws had on interstate commerce. As explained by the Conference Committee Report accompanying the FAAAA, the U.S. Department of Transportation had estimated that state regulation imposed costs of $3 to $8 billion a year on motor carriers and the public. H.R. Conf. Rep. No. 103-677, at 87 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1759. State regulation of carrier operations that had survived ADA preemption "cause[d] significant inefficiencies, increased costs, reduction of competition, inhibition of innovation and technology and curtail[ed] the expansion of markets." *Ibid.*

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air carriers traveling between States. *See* Civil Aeronautics Act of 1938, Pub. L. No. 706, § 403(a), 52 Stat. 973, 992-993 (authorizing regulation of interstate air carriers by the Civil Aeronautics Authority).

Moreover, the different rules governing interstate and intrastate deliveries created perverse incentives for shipping goods across state lines and then back into the State of origin simply to avoid state regulation. *Id.* at 87-88.

The state laws also directly interfered with interstate commerce because the "sheer diversity of these regulatory schemes is a huge problem for national and regional carriers attempting to conduct a standard way of doing business." *Id.* at 87.[5] Preemption was thus "necessary to facilitate interstate commerce" by eliminating the "patchwork of regulation" that state laws imposed on carriers transporting property. *Ibid.* Congress made express statutory findings in enacting the FAAAA that "the regulation of intrastate transportation of property by the States has – (A) imposed an unreasonable burden on interstate commerce; [and] (B) impeded the free flow of trade, traffic,

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[5] *See, e.g., Legislation to Preempt State Motor Carrier Regulations Pertaining to Rates, Routes, and Services: Hearing Before the Subcomm. on Surface Transp. of the House Comm. on Public Works and Transp.*, 103d Cong., 2d Sess. 21 (1994) (testimony of Frank E. Kruesi, Asst. Sec., U.S. Department of Transportation) ("This is a national problem. We all bear the national expense because we purchase goods made by regional, national, and multi-national companies located in States that regulate trucking."); *ibid.* ("The very diversity of 41 [state] regulatory schemes is an additional problem for national and regional carriers which try to conduct a standard way of doing business. The States are known as the Laboratories of Democracy, but this is a case where the laboratories are not helpful to the economic well-being of our country."); *id.* at 122-123 (testimony of James A. Rogers, Vice-President, United Parcel Service) ("How big a problem is State regulation for a company like UPS? It is a big problem. * * * If we want to offer our customers a new service, we have to go to 38 PUCs in 38 different States to get them to approve the service. Every time we file one of these applications, we are at risk that they might order us to present more evidence at a hearing, [and] block service until they make a decision. We end up with a checker board map of States where some we can offer service, some we can't, and we confuse ourselves and we very much confuse our shippers.").

and transportation of interstate commerce." FAAAA, Pub. L. No. 103-305, tit. VI, § 601(a)(1), 108 Stat. at 1605.

In response to these findings, Congress concluded that "certain aspects of the State regulatory process should be preempted." *Id.* § 601(a)(2), 108 Stat. at 1605. Congress thus enacted statutory provisions in the FAAAA preempting state regulation of the transportation of property by all motor carriers, air carriers, and intermodal carriers. For example, Section 601(b) of the FAAAA provides:

> a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier or carrier affiliated with a direct air carrier through common controlling ownership when such carrier is transporting property by aircraft or by motor vehicle (whether or not such property has had or will have a prior or subsequent air movement).

49 U.S.C. § 41713(b)(4)(A).[6]

[6] Section 601(c) similarly preempts state laws "related to a price, route, or service of any motor carrier [not affiliated with a direct air carrier] * * * with respect to the transportation of property." 49 U.S.C. § 14501(c)(1). Because the preemption language in Section 601(c) regarding motor carriers is identical to that discussed in the text in Section 601(b) regarding air and affiliated carriers, and because *amicus* CAA's members are all air carriers or motor carriers affiliated with air carriers, for ease of reference we refer only to Section 601(b) in discussing the FAAAA's preemptive scope. As the text of the provision demonstrates, however, Section 601(c) has comparable preemptive scope for motor carriers. *See also* H.R. Conf. Rep. No. 103-677, at 85, *reprinted in* 1994 U.S.C.C.A.N. at 1757 (FAAAA's two preemption provisions "intended to function in the exact same manner with respect to * * * preemptive effects").

Congress intended a broad scope for FAAAA preemption. Congress modeled the FAAAA on the preemption provision of the ADA, which preempted the enforcement of state laws "relating to rates, routes, or services of any air carrier having authority * * * to provide interstate air transportation." Pub. L. No. 95-504, § 4(a), 92 Stat. at 1708 (codified as amended at 49 U.S.C. § 41713(b)(1)). Based on the ordinary meaning of "relating to," as well as cases interpreting the "relates to" language of the similarly-worded ERISA preemption provision, this Court has held that "State enforcement actions having a connection with, or reference to, airline 'rates, routes, or services' are pre-empted" by the ADA. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992). When Congress used this same language in the FAAAA, Congress was aware of this interpretation and said that it "d[id] not intend to alter the broad preemption interpretation adopted by the United States Supreme Court in *Morales*." H.R. Conf. Rep. No. 103-677, at 83, *reprinted in* 1994 U.S.C.C.A.N. at 1755.[7]

[7] Subsequent to *Morales*, the broad interpretation of the "relates to" language in the ERISA preemption provision on which the *Morales* Court relied has been criticized. *See, e.g., California Div. of Labor Standards Enforcement v. Dillingham Constr., Inc.*, 519 U.S. 316, 336 (1997) (Scalia, J., concurring) (Supreme Court's "first take on [ERISA] was wrong"). Regardless of subsequent developments in ERISA preemption cases, however, Congress intended to incorporate into the FAAAA "the broad preemption interpretation" described in the *Morales* opinion. H.R. Conf. Rep. No. 103-677, at 83, *reprinted in* 1994 U.S.C.C.A.N. at 1755. Congress's choice to adopt *Morales* as the scope of FAAAA preemption must be honored, even if this Court ultimately determines that the scope of preemption recognized in *Morales* was too broad under ERISA or the ADA. In evaluating legislative intent, "the relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the law was," even if "that understanding of Congress was in some ultimate sense incorrect." *Brown v. General Services Admin.*, 425 U.S. 820, 828 (1976). In all event, for the reasons discussed in the text, no matter what interpretation of the FAAAA is

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The FAAAA is clear about what is exempted from its preemptive force, specifying certain types of state laws, including those regarding: (1) safety with respect to motor vehicles; (2) highway route controls or limits based on size, weight, or hazardous materials; (3) insurance; and (4) household goods carriage (*i.e.*, transportation by specialized moving companies). *See* 49 U.S.C. § 41713(b)(4)(B); *United Parcel Serv., Inc. v. Flores-Galarza*, No. 03-1990, 2004 U.S. App. LEXIS 19370, at *7-*10 (1st Cir. Sept. 14, 2004).[8] Congress created no exception in the FAAAA for transportation of alcohol, and thus it clearly falls within the preemption provision. *See Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 212 (1998) (rejecting argument that exception to broad statutory language should be created because Congress did not expressly specify that particular matter would be covered by statute).

2. Michigan's Regulation Of Carriers' Deliveries Is Preempted By The FAAAA

a. The Michigan laws at issue in these cases, as well as the New York laws at issue in *Swedenburg*, are preempted by the FAAAA. The state laws proscribe delivery of alcohol to unauthorized recipients (*i.e.*, delivering alcohol in these States to anyone other than persons authorized by state law to receive them). But the delivery of alcohol is a carrier service that the FAAAA protects from state regulation.

applied, laws regulating whether and how carriers are permitted to make deliveries of alcoholic beverages are preempted.

[8] As amended, Section 601(c) regarding motor carriers contains the same exceptions and also excludes state regulation of the price of for-hire motor vehicle transportation by a tow truck, if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle. *See* 49 U.S.C. § 14501(c)(2); *City of Columbus v. Ours Garage & Wrecker Serv.*, 536 U.S. 424 (2002).

A carrier's delivery of the property it transports is a core part of the carrier's "service," which cannot be regulated by state or other local laws. *Cf. American Airlines, Inc. v. Wolens*, 513 U.S. 219, 226 (1995) (ADA preempts state law claim that relates to airline "'services,' *i.e.*, access to flights and class-of-service upgrades unlimited by retrospectively applied capacity controls and blackout dates" arising from airline frequent flyer program); 49 U.S.C. § 13102(21)(B) (defining "transportation" for motor carriers to include "services related to [the movement of passengers or property], including * * * receipt, [and] delivery").

In an analogous situation, the First Circuit has held that the FAAAA preempts a Puerto Rico statute that "forbids delivery" to recipients who do not show the carrier proof that they have paid excise taxes on the transported goods. *United Parcel Serv., Inc. v. Flores-Galarza*, 318 F.3d 323, 335-336 (1st Cir. 2003). The court reasoned that "[c]ompliance with this provision significantly affects the timeliness and effectiveness of UPS's service, which includes the delivery of packages on an express or time-guaranteed basis." *Id.* at 336; *see also Tocher v. City of Santa Ana*, 219 F.3d 1040, 1047 (9th Cir. 2000) (FAAAA preempts municipal ordinances that imposed "operating requirements" that "directly influence the relationship between a customer and a [carrier]"), *cert. denied*, 531 U.S. 1146 (2001), *overruled on other grounds, City of Columbus v. Ours Garage & Wrecker Serv.*, 536 U.S. 424 (2002).[9]

[9] *See also Soly v. United Parcel Serv., Inc.*, No. 02-CV-10499-MEL, 2002 U.S. Dist. LEXIS 24059, at *1-3 (D. Mass. Aug. 22, 2002) (claims arising from the delivery of packages "arise directly from core services provided by UPS, going to 'the heart of the "services" that UPS provides'"); *Rockwell v. United Parcel Serv., Inc.*, No. 99-CV-57, 1999 U.S. Dist. LEXIS 22036, at *7 (D. Vt. July 7, 1999) (claim regarding "package intake and delivery protocol is, beyond purview, inherently a claim against UPS's services which is also preempted"); *Forman v. Federal Express Corp.*, 753 N.Y.S.2d 348, 351-352 (N.Y. Civ. Ct. 2003) ("Plaintiff

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Moreover, the legislative history of the FAAAA confirms that Congress intended to preempt state laws that targeted carriers for special regulation based on the "types of commodities carried." H.R. Conf. Rep. No. 103-677, at 86, *reprinted in* 1994 U.S.C.C.A.N. at 1758.

Michigan's effort to regulate the manner of delivery, *i.e.*, how carriers may make certain deliveries, is also clearly within the scope of the FAAAA's preemption clause. *See Flores-Galarza*, 318 F.3d at 336 (FAAAA preempts statutory scheme that "imposes extensive requirements that must be met before a carrier may make a lawful delivery").

b. The Michigan and New York laws relate not just to carriers' service, but also to their routes and prices. In order to comply with the laws, *amicus* CAA's members and other carriers must create special routing for the delivery of packages containing alcohol so that the packages can be segregated and trained personnel can perform the various tasks needed to ensure compliance. Non-complying packages must be re-routed to be returned to the shipper. In addition, carriers may have to alter delivery drivers' routes to account for the increased time drivers will spend on deliveries to assure themselves that packages containing alcohol are delivered only to authorized recipients. *See Flores-Galarza*, 318 F.3d at 336 (requirements that prohibit certain deliveries or permit them only after "extensive requirements" are met create a "substantial burden"

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fails to demonstrate how the failure to deliver the contents of a package – arguably the principal service provided by Fed Ex – somehow does not relate to Fed Ex's 'services.'"); *cf. Trujillo v. American Airlines, Inc.*, 938 F. Supp. 392, 394 (N.D. Tex. 1995) (plaintiff's claims were preempted because "the acts [plaintiff] complains of – preparation of the Waybill * * * and delivery of the package – are services" within the meaning of the ADA), *aff'd mem.*, 98 F.3d 1338 (5th Cir. 1996).

in the form of additional labor, costs, and delays, and "directly and significantly affect UPS's routes and services, which depend upon an orderly flow of packages").

The state laws also relate to carriers' rates because compliance can substantially increase the costs for carriers to transport and deliver goods due to the increased costs of identifying and processing packages containing alcohol. *See id.* at 336 (costs of a scheme that imposes requirements on delivery "necessarily have a negative effect" on prices); *Federal Express v. California PUC*, 936 F.2d 1075, 1078 (9th Cir. 1991) ("To regulate [terms of service] is to affect the price."), *cert. denied*, 504 U.S. 979 (1992). Because the Michigan and New York laws relate to carriers' prices, routes, and services, the FAAAA preempts these laws.

3. The Twenty-first Amendment Does Not Limit Congress's Authority To Enact Federal Statutes, Such As The FAAAA, Under Its Commerce Clause Authority

The FAAAA's preemption provisions protecting the ability of air, motor, and intermodal carriers to function in a national market without state law obstacles were enacted pursuant to Congress's power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes," U.S. Const. art. I, § 8, cl. 3, in conjunction with the Necessary and Proper Clause. *See* FAAAA, Pub. L. No. 103-305, tit. VI, § 601(a), 108 Stat. at 1605 (statutory findings); *Kelley v. United States*, 69 F.3d 1503, 1508 (10th Cir. 1995) (upholding FAAAA as valid Commerce Clause legislation), *cert. denied*, 517 U.S. 1166 (1996); *Ace Auto Body & Towing, Ltd. v. City of New York*, 171 F.3d 765, 778-779 (2d Cir.) (same), *cert. denied*, 528 U.S. 868 (1999). Section 2 of the Twenty-first Amendment does not invalidate the FAAAA.

a. Shortly after the Twenty-first Amendment was ratified, this Court rejected the argument that the Amendment divested Congress of its preexisting authority over alcohol under Article I. In *William Jameson & Co. v. Morgenthau*, 307 U.S. 171 (1939) (*per curiam*), the Court considered a challenge to the Federal Alcohol Administration Act, which regulates importers, distillers, bottlers, and wholesalers of alcohol, including those shipping alcohol interstate. *See* Act of Aug. 29, 1935, ch. 814, tit. I, 49 Stat. 977 (currently codified at 27 U.S.C. § 201 *et seq.*). The federal statute was challenged on the ground that Congress had been divested of authority to regulate liquor under the Commerce Clause by the Twenty-first Amendment. This Court saw "no substance in this contention." 307 U.S. at 172-173.

At no point has this Court held that the Twenty-first Amendment insulates state laws or practices from the preemptive force of federal statutes enacted under the Commerce Clause. To the contrary, the Court has consistently rejected the view "that the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause wherever regulation of intoxicating liquors is concerned. * * * Such a conclusion would be patently bizarre and is demonstrably incorrect." *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 331-332 (1964).

Thus, in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), and again in *324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987), the Court held that the Sherman Act's broad language preempted state laws that required fixed prices for liquor. In both cases, the Court rejected the State's argument that the Twenty-first Amendment allowed the State to disregard federal law. *See Midcal*, 445 U.S. at 113-114; *Duffy*, 479 U.S. at 352.

Similarly, in *Capital Cities Cable v. Crisp*, 467 U.S. 691 (1984), this Court held that a generally applicable federal agency regulation governing cable television preempted a state law that prohibited advertising of alcoholic beverages. The Court rejected the State's argument that the Twenty-first Amendment "rescue[s] the statute from pre-emption," explaining that, "[n]otwithstanding the Amendment's broad grant of power to the States * * * the Federal Government plainly retains authority under the Commerce Clause to regulate even * * * liquor." *Id.* at 712-713.

There is language in these cases that suggests the Court was seeking to "balance" or "harmonize" federal and state interests. *See Midcal*, 445 U.S. at 109; *Duffy*, 479 U.S. at 346; *Crisp*, 467 U.S. at 714, 716. But as the private petitioner in the instant cases acknowledges, "[i]n each case" in which "state alcohol regulations" were challenged as violations of "affirmative exercises of Congress's power under the Commerce Clause," "the federal power won." 03-1120 Pet. Br. 27. Indeed, the Court's "balance" of competing interests in cases such as *Midcal*, *Duffy*, and *Crisp* appears no different from standard application of the Supremacy Clause, in which the federal government must prevail. *Cf. Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) ("The Federal Government holds a decided advantage in this delicate balance: the Supremacy Clause. U.S. Const., Art. VI, cl. 2. As long as it is acting within the powers granted it under the Constitution, Congress may impose its will on the States.").

In *Crisp*, for example, the Court accepted that the state law was "designed to further the State's interest in discouraging consumption of intoxicating liquor" and was "a reasonable, albeit limited, means of furthering the goal of promoting temperance in the State." *Id.* at 715. Yet the

Court unanimously held that "the Twenty-first Amendment does not save the [law] from pre-emption," because a federal regulation designed to ensure "diverse cable services" outweighed the State's interests. *Id.* at 715-716.

The *amicus* brief of 33 States in support of petitioners has reached this same conclusion, acknowledging that "when Congress speaks, the question is one of pre-emption under the Supremacy Clause." Br. of Ohio and 32 Other States as *Amici Curiae* 8. They explain that under this Court's cases, "Commerce Clause legislation enacted by Congress" is treated like "other constitutional limitations" with which States must comply without regard to the Twenty-first Amendment. *Id.* at 8-9.

Nor is there anything about applying the FAAAA's express preemption in the context of state laws directed at the delivery of alcohol that puts it beyond Congress's Commerce Clause authority. This Court has consistently suggested that efforts by States to regulate transportation of alcohol within their own borders can be preempted by affirmative federal law. *See United States v. State Tax Comm'n of Miss.*, 412 U.S. 363, 377 (1973) ("a State may, *in the absence of conflicting federal regulation*, properly exercise its police powers to regulate and control such [liquor] shipments during their passage through its territory" (emphasis added)); *North Dakota v. United States*, 495 U.S. 423, 439 (1990) (plurality) ("Congress has the power to confer immunity from state regulation on Government suppliers beyond that conferred by the Constitution alone, even when the state regulation is enacted pursuant to the State's powers under the Twenty-first Amendment." (citations omitted)).

Certainly, if, as in *Crisp*, a federal policy in favor of access to cable television can trump a State's interest in promoting temperance, then a federal policy in favor of

unfettered national commercial markets for the transportation of property likewise must supercede state laws that are seemingly motivated by a combination of temperance and economic protectionism. To hold otherwise would draw into question not only the FAAAA, but also other federal legislation.

For example, Congress recently enacted legislation designed to reduce the number of bulky packages that passengers carry onto airplanes now that greater precautions regarding air safety are in place. *See* 148 Cong. Rec. H6749 (daily ed. Sept. 26, 2002) (Rep. Gallegly). Congress mandated that, even though many States now forbid direct shipments of alcohol, it is lawful for consumers to receive direct shipments of wine if they purchase the wine on-site at a winery and could have carried it into their home State themselves. Specifically, Congress provided that "[d]uring any period in which the Federal Aviation Administration has in effect restrictions on airline passengers to ensure safety, the direct shipment of wine shall be permitted from States where wine is purchased from a winery, to another State" if the consumer "could have carried the wine lawfully into the State * * * to which the wine is shipped." Pub. L. No. 107-273, Div. C, tit. I, subtit. A, § 11022, 116 Stat. 1758, 1829 (codified at 27 U.S.C. § 124). Congress intended that transportation by commercial carriers would be a substitute for consumers' bringing their winery purchases onto airplanes.[10] Any suggestion that Congress lacks the power to preempt state laws regulating direct shipments of wine under its Commerce

[10] The U.S. Postal Service is not an available alternative for such shipping because Congress has forbidden the mailing of alcohol. *See* 18 U.S.C. § 1716(f).

Clause authority would have the potential for interfering with a number of substantial national interests.

b. Michigan suggests that the legislative history of the Twenty-first Amendment indicates that many (if not all) of the opinions discussed above were wrongly decided. 03-1116 Pet Br. 20-21. In particular, Michigan argues, the omission of proposed Section 3 of the Amendment, which would have granted Congress "concurrent power to regulate or prohibit the sale of intoxicating liquors to be drunk on the premises where sold," 76 Cong. Rec. 4138 (1933), *i.e.*, to regulate "saloons," reflects an intent to preclude any federal interference with state liquor regulation. But Congress's rejection of proposed Section 3 reflects no such intention. *See Duffy*, 479 U.S. at 347 n.10 (finding no "clear demonstration of congressional intent" to "confer on States complete and exclusive control of the commerce of liquor" in the debates surrounding the Amendment).

The debates around proposed Section 3 demonstrate that members of Congress were concerned about granting the federal government any new authority, particularly one that might continue the nationalization of criminal law that had occurred during the Prohibition era. *See* 76 Cong. Rec. 4141 (1933) (Sen. Blaine); *id.* at 4177-4178 (Sen. Black); *id.* at 4220 (Sen. Reed). There is no indication, however, that Congress intended to *limit* its own existing authority to regulate commerce pursuant to the Commerce Clause.

To the contrary, several Senators explained that they supported omitting Section 3 based in part on their understanding that Congress's existing authority to regulate liquor under the Commerce Clause was not affected. *See* 76 Cong. Rec. 4219 (1933) (Sen. Fletcher) ("I recognize, of course, that the Congress has power to regulate interstate commerce and to prohibit the movement of wet goods into dry States and that sort of thing. That is in the law now;

we do not need to express that in a new amendment to the Constitution."); *id.* at 4225 (Sen. Reed) (Congress "can prevent shipments into dry States; it can do that at present; it does not need any further grant of constitutional power for that."); *id.* at 4144 (Sen. Wagner) (Section 3 not needed "to restore the constitutional balance of power and authority in our Federal system which had been upset by national prohibition"). Thus, there is nothing in the history of the Twenty-first Amendment that suggests that Congress was deprived of its original authority under Article I to enact laws regulating interstate commerce merely because those laws regulate interstate transportation of alcohol.

B. State Laws That Regulate Deliveries Of Alcohol By Interstate Carriers Can Violate The Dormant Commerce Clause's Proscription Against Local Laws That Unduly Burden The Interstate Movement Of Goods

In addition to being preempted under the FAAAA, Michigan's laws are subject to review under the Constitution's Dormant Commerce Clause. "The negative or dormant implication of the Commerce Clause prohibits state * * * regulation that discriminates against or unduly burdens interstate commerce and thereby 'imped[es] free private trade in the national marketplace.'" *General Motors Corp. v. Tracy*, 519 U.S. 278, 287 (1997) (citations omitted).

Therefore, even if the Court were not to reach the FAAAA preemption argument, the judgment below should be affirmed on respondents' Dormant Commerce Clause discrimination argument. As respondents demonstrate, Michigan's laws should be declared unconstitutional because they discriminate on their face between goods

based solely on whether they originate from out-of-state and thus fall within the "virtually *per se* rule of invalidity" embodied in the Clause. *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). Moreover, an undue burden argument should not be foreclosed in cases such as these involving state regulation of the delivery of alcohol.

1. The Twenty-first Amendment Does Not Authorize Enforcement Of State Laws That Otherwise Violate The Dormant Commerce Clause

Michigan and private petitioner argue that Section 2 of the Twenty-first Amendment automatically immunizes the state laws at issue in these cases from invalidity under the Dormant Commerce Clause, and appear to suggest that no state law enacted with regard to the transportation of alcohol can be invalidated, regardless of its discriminatory character or the burden imposed on interstate commerce.

But this Court has never adopted that view, recognizing that to do so would free States to adopt laws that would unduly burden interstate commerce in a manner that would harm citizens of the several States and the Nation as a whole. Indeed, as we discuss below, the current patchwork of state laws regulating the delivery of alcohol creates such harms.

Michigan and private petitioner all concede that in order for a state law to fall within Section 2 of the Twenty-first Amendment, the law must be an otherwise constitutional law. *See* 03-1116 Pet. Br. 31 ("Michigan does not contend that the 21st Amendment immunizes it from other provisions of the Constitution. This Court's decisions clearly indicate that it does not."); 03-1120 Pet. Br. 25 ("state regulation of beverage alcohol is of course subject * * * to the First Amendment and other provisions of the

Constitution"). Indeed, even state laws dealing with "importation," one of the matters expressly addressed by the text of Section 2, are subject to all of the Constitution's existing constraints. *See* 03-1116 Pet. Br. 26-27, 31-32 (citing with approval *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964) (state taxation of liquor subject to Constitution's Export-Import Clause)); 03-1120 Pet. Br. 29 (same).

As this Court has held, there is nothing in the text of Section 2 of the Twenty-first Amendment that exempts state laws from Dormant Commerce Clause scrutiny. *See Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276 (1984); *Healy v. Beer Inst.*, 491 U.S. 324, 341-342 (1989); *id.* at 344 (Scalia, J., concurring in part and concurring in judgment). Thus, under current precedent, state laws forbidding carriers from delivering alcohol and regulating the manner of delivery are subject to invalidation under the Dormant Commerce Clause. As respondents demonstrate, the Court should not retreat from these holdings, which are a proper interpretation of the Twenty-first Amendment and are entitled to respect as a matter of *stare decisis*.[11]

[11] Petitioners suggests that the Webb-Kenyon Act, 27 U.S.C. § 122, reflects Congress's intent to allow state laws that would otherwise violate the Dormant Commerce Clause. 03-1116 Pet. Br. 36-38; 03-1120 Pet. Br. 16-17. But there is nothing in that Act, just as there is nothing in the Twenty-first Amendment itself, that indicates that Congress intended to authorize discriminatory laws or laws placing undue burdens on instrumentalities of interstate commerce when the burdens outweigh any purported local interest. Indeed, in light of the FAAAA and 27 U.S.C. § 124, the Webb-Kenyon Act simply cannot be understood to sanction all state laws regulating transportation of alcohol.

2. State Laws Regulating Deliveries Of Alcohol Impede The Development And Functioning Of A National Market, And May Place An Undue Burden On Interstate Movement Of Goods

The parties in these cases have focused on the state laws' facial discrimination in their treatment of in-state and out-of-state sellers. As respondents explain, the laws at issue in these cases violate fundamental tenets of the Dormant Commerce Clause by discriminating against interstate commerce in favor of local industry and intrastate transportation.

Even if this Court were to reject respondents' claims of unconstitutional discriminatory treatment, however, serious questions would remain open for future litigation concerning the constitutionality of the burden that these laws, viewed in the aggregate, impose on interstate carriers under the Dormant Commerce Clause. The validity of the Michigan provisions regulating carriers was not litigated on this theory and thus there are not facts in the record to establish the full extent of the burden on interstate commerce. Yet there are strong indications that enforcement of these laws against carriers may be contrary to the constitutional principle against economic balkanization reflected in the Commerce Clause. *See Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979).

a. More than a century ago, this Court held that the Commerce Clause by its own force proscribes state regulation of the "transportation of passengers or merchandise through a State, or from one State to another" when there is a threat that "commercial intercourse between States remote from each other may be destroyed." *Case of State Freight Tax*, 82 U.S. (15 Wall.) 232, 279-280 (1873); *see also Louisville & Nashville R.R. v. F.W. Cook Brewing Co.*,

223 U.S. 70, 82-83 (1912) ("it is not competent for any State to forbid any common carrier to transport" any commodity that is the "legitimate subject of interstate commerce" because such regulation would be "an unlawful regulation of interstate commerce not authorized by the police power of the State").

Direct regulation by States regarding the transportation of alcohol creates precisely the kind of "oppressive" burden on interstate carriers that led this Court in *Wabash, St. Louis and Pacific Railway Co. v. Illinois*, 118 U.S. 557 (1886), to hold that the Dormant Commerce Clause proscribed state regulation of the intrastate conduct of interstate carriers. The Court reasoned that, "if each one of the states through whose territories these goods are transported can fix its own rules for prices, for modes of transit, for times and modes of delivery, and all the other incidents of transportation to which the word 'regulation' can be applied, it is readily seen that the embarrassments upon interstate transportation, as an element of interstate commerce, might be too oppressive to be submitted to." *Id.* at 572.

The Court has reaffirmed, time and again, that early understanding of the practical effect of diverse local regulation on interstate commerce in cases involving transportation of persons and property by interstate carriers. *See, e.g., Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981); *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429 (1978); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959); *Southern Pac. Co. v. Arizona*, 325 U.S. 761 (1945).

The factual conclusion in those cases that many state laws regulating carriers unduly interfered with interstate commerce received the express endorsement of Congress in the enactment of the FAAAA. As noted above, Congress found, similar to this Court's determinations in *Wabash*

and its progeny, that diverse state regulation of carriers "impose[s] an unreasonable burden on interstate commerce * * * [and] impede[s] the free flow of trade, traffic, and transportation of interstate commerce." Pub. L. No. 103-305, tit. VI, § 601(a)(1), 108 Stat. at 1605.

b. Many States regulate not just sellers and buyers of alcohol, but also *carriers*, making it unlawful (and criminal) for carriers to deliver alcohol to certain recipients or otherwise make deliveries that do not conform to state law. For example, many States, including Michigan and New York, forbid carriers from making certain deliveries of alcohol either to unauthorized recipients or from unlicensed shippers. The specific regulations vary, however, from State to State. *See, e.g.*, Alaska Stat. § 04.11.499 (forbidding any person from transporting alcoholic beverages into certain communities); Colo. Rev. Stat. § 12-47-901(l) (permitting deliveries only if the shipper is licensed in Colorado); Fla. Stat. ch. 561.545(2) (making it unlawful to knowingly and intentionally transport any alcoholic beverage from out-of-state to anyone other than a licensed recipient, registered exporter, or state-bonded warehouse); Me. Rev. Stat. Ann. tit. 28, § 2077-B (forbidding the delivery of liquor from an out-of-state company by mail order); Mich. Comp. Laws § 436.1203(1) (forbidding the delivery of alcoholic liquor unless it is made by the State or State licensees); Miss. Code Ann. § 27-71-315 (forbidding deliveries of beer and light wines to anyone other than licensed wholesalers and distributors); N.H. Rev. Stat. Ann. § 178:27(II) (forbidding carriers from shipping into certain areas of the State); N.Y. Alco. Bev. Cont. § 102(d) (permitting deliveries only to consignees who are licensed); Tenn. Code Ann. § 57-3-402(b) (forbidding the delivery of alcohol unless it is to a licensed manufacturer, wholesaler, or certain other authorized recipients).

Such laws can impede the flow of interstate commerce because they disrupt carriers' operations, increase costs, and slow service. As a result, carriers cannot employ uniform procedures for handling and transporting property nationwide. The resulting inefficiencies and delays caused by such state laws may constitute an undue burden on interstate commerce in violation of the Commerce Clause that could not be sustained unless supported by important state interests that justify the burden. *See Raymond Motor Transp.*, 434 U.S. at 440-441 (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

The Dormant Commerce Clause serves a fundamental purpose in making the United States the world's largest single economic market, a market in which interstate carriers of property play a critical role. This Court should not adopt a rule that any state law relating to alcohol, regardless of its discriminatory character or direct burden on interstate carriers, would be completely immune from any judicial scrutiny under the Dormant Commerce Clause. Nothing in the Twenty-first Amendment requires this Court to sanction unlimited balkanization of that national market when the product being carried is alcohol.

CONCLUSION

For the reasons set forth above and in the respondents' brief, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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JENNIFER M. GRANHOLM, GOVERNOR, *et al.*,
Petitioners,

v.

ELEANOR HEALD, *et al.*,
Respondents.

MICHIGAN BEER & WINE
WHOLESALERS ASSOCIATION,
Petitioner,

v.

ELEANOR HEALD, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF *AMICUS CURIAE* DKT LIBERTY PROJECT IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

Thomas Jefferson warned, "the natural progress of things is for liberty to yield and government to gain ground." Mindful of this trend, the DKT Liberty Project was founded to promote civil liberties – including economic liberties – against encroachment by all levels of government. This not-for-profit organization advocates vigilance over regulation of all kinds, especially restrictions of civil and economic liberties that threaten the reservation of power to the citizenry that underlies our constitutional system.

The protectionist and discriminatory state laws at issue in this case implicate fundamental constitutional guarantees against government overreaching. The Liberty Project submits this brief to provide a full discussion of the historical context and original understanding of Section 2 of the 21st Amendment, which demonstrates that the Amendment did not give states the unprecedented power to discriminate against the citizens and products of other states.

SUMMARY OF ARGUMENT

Section 2 of the 21st Amendment provides:

> The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

U.S. Const., amend. XXI, § 2. As its language indicates, Section 2 gives constitutional sanction and effect to state laws regulating transportation or importation of alcohol by prohibiting the violation of those state laws. Petitioners and their supporting state *amici* concede, however, that Section 2

---

[1] This brief is filed with the consent of the parties, as indicated by letters filed with the Court. No party authored this brief in whole or in part and no one, other than *amicus curiae* or its counsel, monetarily contributed to the preparation or submission of this brief.

does *not* give effect to *all* such state laws, regardless of the constitutional validity they would otherwise have. Mich. Pet. Br. 31; Mich. Wholesalers Ass'n Pet. Br. 14; Ohio Amicus Br. 9. For example, Section 2 does not allow states to discriminate on the basis of race or gender by banning importation by black but not white persons, or by men but not women. Petitioners nonetheless claim that Section 2 does allow overt protectionist discrimination in favor of in-state products and against out-of-state products.

Whatever merit Petitioners' argument might have, it cannot rely on the *text* of Section 2, which in no way distinguishes between the validity of state laws that discriminate on the basis of state origin and those that discriminate on the basis of race or gender or violate other constitutional proscriptions. In truth, Petitioners' position is based not on the Amendment's text, but on a historical premise: that Section 2 was intended to override the Commerce Clause, but not other constitutional provisions.

The legal history is clear, however, that Section 2 was intended to override the then-prevalent understanding of the Commerce Clause only insofar as the Section allows states to regulate importation and transportation of alcohol through *evenhanded* police laws. Section 2 does not trump the virtually *per se* Commerce Clause rule that prevents states from *discriminating* against out-of-state products or against interstate commerce generally.

The text of Section 2 was based directly on the language of the pre-Prohibition Webb-Kenyon Act. Indeed, Petitioners concede that the purpose of Section 2 was to write the rule of Webb-Kenyon into the Constitution. *See infra* at 22. But when the 21st Amendment was ratified, it was well-established that the Webb-Kenyon Act and its precursor, the Wilson Act, allowed enforcement only of evenhanded state police laws regulating or prohibiting alcohol, not

discriminatory or protectionist laws. Section 2 enshrined that rule in the Constitution, but did not give the states new and unprecedented powers to discriminate.

In the 19th century, prior to passage of the Wilson and Webb-Kenyon Acts, this Court held that states had plenary authority under their police powers to regulate alcohol use and distribution, but that state laws enacted pursuant to that plenary police power nonetheless could not – without congressional authorization – reach interstate commerce in alcohol, because the Commerce Clause committed regulation of interstate commerce exclusively to Congress. In addition, the Court broadly construed interstate commerce to encompass not only the transportation and importation of alcoholic beverages (or other articles of commerce), but also their resale in the "original package." Thus, even when a state passed a comprehensive, nondiscriminatory prohibition law banning all alcohol sales, a merchant was still free to set up shop to import alcohol from out of state and resell it in state in its original package. Interstate commerce and out-of-state products were thereby *favored* over domestic commerce and products, because the former were *absolutely* beyond state regulation, even under evenhanded police laws. That rendered state-level prohibition meaningless as a practical matter.

The Wilson Act was Congress's first attempt to remedy this situation by leveling the playing field and allowing states to regulate imported alcohol on the same terms as the domestic product. The Wilson Act allowed states to enforce their police laws against imported alcohol once it was received by the in-state consignee. Hence, resale of the imported product in state, even when still in the original package, became subject to state regulation. The Wilson Act's constitutionality was hotly contested, however, on the ground that the Act represented an unconstitutional

delegation to the states of Congress's exclusive commerce power. Rejecting that argument, this Court reaffirmed the established principle that Congress could not delegate its commerce power, but held that the Wilson Act was not such a delegation insofar as it permitted states to enforce their evenhanded police laws to imported alcohol. The Court reasoned that the Wilson Act did not delegate Congress's commerce power, but instead merely took the interstate-commerce immunity to state regulation away from imported alcohol, thereby allowing the states' preexisting police powers to reach those imports.

Although subtle, the distinction drawn by the Court between an impermissible delegation of the commerce power and a permissible elimination of immunity from state police laws had enormous practical significance: it meant that states could subject imports only to traditional police regulation, which does *not* include the power to *discriminate* against out-of-state products. Thus, in the landmark case of *Scott v. Donald*, 165 U.S. 58 (1897), the Court held that the Wilson Act does not allow a state to enforce a law that discriminates against imports in favor of in-state products, precisely because protectionist and discriminatory state laws are not encompassed within the states' police power. The Court unanimously reiterated that holding in *Vance v. W.A. Vandercook Co.*, 170 U.S. 438 (1898), explaining that discrimination against out-of-state products is "not a police law, in the correct sense of those words," *id.* at 450; *see also id.* at 462 (Shiras, J., dissenting) (agreeing that discrimination by state is not a "bona fide exercise of its police power").

The Webb-Kenyon Act extended the Wilson Act to cover not only the resale of imported alcohol in the original package, but also the acts of transporting and importing such alcohol into the state in the first instance. But the Webb-Kenyon Act did not – and could not – alter the rule of *Scott*

and *Vance* that removal of the interstate commerce immunity from alcohol imports still allowed enforcement only of evenhanded state laws, because discriminatory regulations are not bona fide police laws. Indeed, this Court expressly held that the power exercised by Congress in the Webb-Kenyon Act was identical to that behind the Wilson Act, the only difference being that Webb-Kenyon allows evenhanded state regulation at an earlier point in the course of importation. The legislative history of Webb-Kenyon confirms that construction and is replete with explanations that the purpose of the law was to subject imports to the *same* police regulations that apply to domestic alcohol. And, adhering to this Court's rulings in *Scott* and *Vance*, the South Carolina Supreme Court held that the Webb-Kenyon Act, like the Wilson Act, does not permit enforcement of state laws that discriminate against out-of-state products. In contrast, we are unaware of *any* case upholding a discriminatory state law under either the Wilson or the Webb-Kenyon Act.

The 18th Amendment destroyed the balance struck by Webb-Kenyon by both nationalizing and constitutionalizing a subject that had been left to state police regulation. When that experiment failed, the purpose of the 21st Amendment was not simply to end Prohibition, but to restore the prior balance of authority established by the Webb-Kenyon Act. But the framers of the 21st Amendment understood that a future Congress could repeal a statute such as Webb-Kenyon, and dissenting opinions from this Court precluded certainty about the statute's constitutionality. If Webb-Kenyon were repealed or struck down in the future, imported alcohol would again become immune from *all* state police regulations, and dry states could no longer be dry. To prevent that from occurring, the text of the Webb-Kenyon Act, edited to remove excess verbiage, was included in the 21st Amendment as Section 2.

That constitutionalization of the rule did not alter its scope in any way, and certainly did not authorize unprecedented discrimination against out-of-state products. When the 21st Amendment was ratified, the rule was well established that states could not pass or enforce laws discriminating against imported alcohol, even after the imports lost their interstate-commerce immunity to state regulation. State laws that discriminate against goods imported from other states are *per se* invalid, and always have been. Section 2 did not change that rule, but simply gave constitutional assurance that otherwise valid state laws could reach imports on the same terms as domestic products.

ARGUMENT

The History of the 21st Amendment Demonstrates That Section 2 Permits States to Regulate Imported Alcohol Pursuant to Evenhanded Laws, Not to Discriminate Against Out-of-State Products.

A. Before Section 2, the Commerce Clause Barred States from *All* Regulation of Alcohol Importation or Resale in the Original Package, Gutting State Prohibition Laws.

The 21st Amendment was adopted in 1933, before the fundamental changes in Commerce Clause doctrine that began during the New Deal. At that time, a century of decisions from this Court, stretching back to *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), treated the spheres of state and federal regulation as absolutely separate and mutually exclusive. The states but not the federal government could regulate their own domestic affairs under the police power, whereas the federal government but not the states could regulate interstate commerce. While the borderline between these spheres was sometimes obscure,

once established it could not be crossed. As the Court explained in 1891:

> [I]t is not to be doubted that the power to make the ordinary regulations of police remains with the individual states, and cannot be assumed by the national government . . . . The power of congress to regulate commerce among the several states, when the subjects of that power are national in their nature, is also exclusive.

Wilkerson v. Rahrer, 140 U.S. 545, 555 (1891). In the absence of congressional regulation, interstate commerce was deemed to be free and unregulated by the states as well:

> The constitution does not provide that interstate commerce shall be free, but, by the grant of this exclusive power to regulate it, it was left free except as congress might impose restraint. Therefore it has been determined that the failure of congress to exercise this exclusive power in any case is an expression of its will that the subject shall be free from restrictions or impositions upon it by the several states.

Id.

Accordingly, once a subject was determined to be "interstate commerce," it was wholly outside the reach of state regulation, absent congressional action. Interstate commerce was, moreover, expansively defined to include not only the interstate sale and shipment of goods, but also the resale of imports within a state so long as they remained in their "original package." *See, e.g., Leisy v. Hardin*, 135 U.S. 100, 110-11, 122 (1890); *Vance*, 170 U.S. at 444-45.

As a result, the Commerce Clause barred state regulation of commerce in alcoholic beverages in at least three distinct ways:

> (a) Beyond dispute, the respective states have plenary power to regulate the sale of intoxicating liquors within their borders, . . . *provided . . . that the regulations do not operate a discrimination* against the rights of residents or citizens of other states of the Union.
>
> (b) Equally well established is the proposition that the *right to send liquors from one state into another, and the act of sending the same*, is interstate commerce, the regulation whereof has been committed by the constitution of the United States to congress, and hence that a state law which denies such a right . . . is in conflict with the constitution of the United States.
>
> (c) It is also certain that the settled doctrine is that the power to ship merchandise from one state into another carries with it, as an incident, *the right in the receiver of the goods to sell them in the original packages*, any state regulation to the contrary notwithstanding . . . .

Vance, 170 U.S. at 444-45 (emphasis added).

Thus, the requirement that states regulate evenhandedly and not "discriminat[e] against the rights of residents or citizens of other states" was then, as it is now, an absolute limitation on the states' plenary or police powers (paragraph (a) above). *See also, e.g., Walling v. Michigan*, 116 U.S. 446, 460 (1886) (observing that the "police power . . . would be a perfect justification" of a tax on alcohol "if it did not discriminate against the citizens and products of other states"); *McDermott v. Wisconsin*, 228 U.S. 115, 132 (1913)

("it is . . . well settled that the state may not, under the guise of exercising its police power or otherwise, . . . discriminate against interstate commerce").

In addition, however, the Commerce Clause also gave *favored* treatment to interstate transactions by absolutely immunizing them from the very same state laws that applied to wholly domestic matters. And that immunity from state regulation extended not only to sales and importation across state lines (paragraph (b) above), but also to subsequent sales of imports within the state itself, so long as the imported products remained in their original packages (paragraph (c)).

Leisy v. Hardin, 135 U.S. 100 (1890), exemplifies how that then-established understanding of the Commerce Clause effectively nullified state prohibition laws. At issue in *Leisy* was an Iowa law that absolutely prohibited all sales of alcoholic beverages, whether domestic or imported. *Id.* at 124.[2] The Court nonetheless held that the Iowa law could not, without congressional authorization, be enforced against non-residents who imported alcohol from neighboring states and resold it in Iowa in its original packages. *Id.* at 124-25. As the facts in *Leisy* itself vividly attest, that immunity from state regulation allowed importers to set up shops in the nominally dry state for the sale of imported alcohol in its original package, rendering the state's prohibition law a dead letter.

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[2] The Iowa law – like most of the other state regulations discussed in this brief – contained exceptions for non-beverage alcohol sold for sacramental, chemical, or medicinal purposes. In the case of sales for medicinal purposes, the exception applied only to licensed pharmacists who were Iowa citizens. 135 U.S. at 124. However, that discriminatory element of the law was not at issue in *Leisy*, because the out-of-state plaintiffs sought to sell imported alcohol as a beverage, not for medicinal purposes, and the Iowa law absolutely banned the sale of beverage alcohol by citizens and non-citizens alike.

B. The Wilson Act Took Away the Immunity of Original Package Sales from State Police Regulation, But Did Not and Could Not Give States a New Power to Discriminate Against Imported Alcohol.

Five months after *Leisy* was decided, Congress reacted by passing the Wilson Act, which provides:

> That all . . . intoxicating liquors . . . transported into any State or Territory . . . shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such . . . liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.

26 Stat. 313, ch. 728 (1890), *codified at* 27 U.S.C. § 121.

The Wilson Act was subject to almost immediate attack as an unconstitutional delegation of congressional power. *See Wilkerson v. Rahrer*, 140 U.S. 545 (1891). The day after the Act's passage, a non-resident was arrested for selling imported alcohol in its original package in Kansas, in violation of that state's general prohibition law, which "applied to the sale of all intoxicating liquors whether imported or not." *Id.* at 564. The Court in *Rahrer* began with and reaffirmed the well-established premise "that congress can neither delegate its own powers, nor enlarge those of a state." *Id.* at 560. The Court nonetheless upheld the Wilson Act's constitutionality on the ground that "congress ha[d] not attempted to delegate the power to regulate commerce, or to exercise any power reserved to the states, or to grant a power not possessed by the states, or to adopt state laws." *Id.* at 561. Instead, the Court found,

Congress had removed a barrier to the enforcement of otherwise valid and nondiscriminatory "laws of the state . . . passed in the exercise of its police powers, and applied to the sale of all intoxicating liquors whether imported or not." *Id.* at 564. The Wilson Act simply "provide[s] that certain designated subjects of interstate commerce shall be governed by a rule which divests them as of that character at an earlier period of time than would otherwise be the case." *Id.* at 562. Thus:

> Congress did not use terms of permission to the state to act, but simply removed an impediment to the enforcement of the state laws in respect to imported packages in their original condition . . . .

Id. at 564. By divesting imported alcohol of its character as interstate commerce, Congress eliminated its immunity from state regulation, thereby allowing the same police laws that applied to domestic alcohol to take effect.

In *Scott v. Donald*, 165 U.S. 58 (1897), the Court made explicit what was implicit in the rationale of *Rahrer*: the Wilson Act did not permit states to enforce protectionist laws that discriminated against imported alcohol in favor of domestic products. The Court explained:

> The question whether a given state law is a lawful exercise of the police power is still open, and must remain open, to this court. Such a law may forbid entirely the manufacture and sale of intoxicating liquors, and be valid; or it may provide equal regulations for the inspection and sale of all domestic and imported liquors, and be valid. But the state cannot, under the [Wilson Act], establish a system which, in effect, discriminates between interstate and domestic commerce . . . .

Id. at 100. Under the Wilson Act, "equality or uniformity of treatment under state laws was intended," so that the Act "was not intended to confer upon any state the power to discriminate injuriously against the products of any other state." *Id.* Thus,

> when a state recognizes the manufacture, sale, and use of intoxicating liquors as lawful, it cannot discriminate against the bringing of such articles in, and importing them from other states; . . . such legislation is void as . . . an unjust preference of the products of the enacting state as against similar products of the other states.

Id. at 101. Applying this construction of the Act, the Court struck down the South Carolina law at issue in *Scott*, because the law discriminated against sales of imported alcohol in the original package in favor of domestic alcohol. *Id.* at 99.

The Court unanimously reaffirmed *Scott*'s holding the next year in *Vance v. W.A. Vandercook Co.*, 170 U.S. 438 (1898). As the majority opinion explained:

> [A]lthough the [Wilson Act] authorizes a state law to attach to an original package so as to prevent its sale, it did not contemplate and sanction the operation of a state law which injuriously discriminated against the products of other states, and which *in consequence of such discrimination, was not a police law, in the correct sense of those words.*

Id. at 449-50 (emphasis added). In complete agreement on this point, the dissent in *Vance* likewise explained that a state alcohol regulation is not "a bona fide exercise of [a state's] police power," and thus is not effective under the Wilson Act, unless it applies "with equal effect as to such liquor whether imported or of domestic manufacture." *Id.* at 462 (Shiras, J., dissenting). The majority and dissent disagreed

about the application of this antidiscrimination principle in the particular case before the Court, with the majority upholding the South Carolina law as it applied to original package sales on the ground that it had been amended since *Scott* to eliminate discrimination against imports. *See id.* at 443 (finding that statute "does not contain those clauses in the previous statute which were held to operate as a discrimination"). Despite this disagreement concerning application, not a single Justice disputed that a law that discriminates is not a valid exercise of the state's police power, and thus could not be enforced under the Wilson Act.

On the same day it decided *Vance*, a sharply divided Court also gave the Wilson Act a narrowing construction in *Rhodes v. Iowa*, 170 U.S. 412 (1898). *Rhodes* held that imported alcohol did not "arrive" in a state for purposes of the Wilson Act until it had been received by the in-state consignee, which meant that even a nondiscriminatory police law could not be applied during the importation and transportation of alcohol until delivery to the consignee. *Id.* at 426. The Court reasoned that importation and interstate transportation are core aspects of interstate commerce, whereas resale of imports in the original package is merely an incident of such commerce. *Id.* at 424. The Court therefore required a clear statement from Congress before the immunity of interstate commerce would be removed from transportation and importation as well as from resale in the original package. *Id.* (requiring "the clearest implication"); *see also id.* at 423 (observing that had that been Congress's intent, "such purpose would have been easy of expression"). Accordingly, the Court held that Iowa's evenhanded law concerning transportation of alcohol within the state could not be applied to a imported shipment until transportation was completed by delivery to the in-state consignee. *Id.* at 426; *see also id.* at 418-19 (observing that Iowa law applied

both to transportation originating within and outside the state).[3]

C. The Webb-Kenyon Act Extended the Wilson Act So That Evenhanded State Regulation Could Reach Importation and Interstate Transportation of Alcohol, But the Act Did Not Create a New Power to Discriminate Against Imports.

The clear statement demanded by the Court in *Rhodes* was supplied by Congress in 1913 though the Webb-Kenyon Act, which provides:

> That the shipment or transportation . . . of any . . . intoxicating liquor of any kind, from one State, Territory, or District of the United States . . . into any other State, Territory, or District . . . which . . . intoxicating liquor is intended . . . to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District . . . is hereby prohibited.

37 Stat. 699-700, ch. 90 (1913), *codified at* 27 U.S.C. § 122.

Read in historical context, the plain effect of the Webb-Kenyon Act is to extend the rule of the Wilson Act so that state police laws could reach importation and transportation

[3] *See also Vance*, 170 U.S. at 451-57 (upholding evenhanded state law as it applied to resale of imported alcohol in original package, but following *Rhodes* in holding that another evenhanded provision could not be enforced against interstate shipper); *Adam Express Co. v. Kentucky*, 214 U.S. 218 (1909) (following *Rhodes* in holding that evenhanded law barring knowing transportation of alcohol to inebriate could not be enforced against interstate shipper); *Louisville & Nashville R.R. Co. v. F.W. Cook Brewing Co.*, 223 U.S. 70 (1912) (following *Rhodes* and holding that evenhanded law barring transportation of alcohol to consignee in dry county could not be enforced against interstate shipper).

of alcohol *before* delivery to the in-state consignee. Equally clear, the Webb-Kenyon Act, like the Wilson Act, only gives effect to evenhanded state laws, not laws that discriminate against interstate commerce. When Webb-Kenyon was enacted, it was well established that Congress could not delegate its commerce power, but could only "remove[] an impediment to the enforcement of . . . state laws" "passed in the exercise of [the state's] police powers." *Rahrer*, 140 U.S. at 564. That Congress intended to do just that through Webb-Kenyon is confirmed by its title: "An Act Divesting Intoxicating Liquors of Their Interstate Character in Certain Cases." 37 Stat. 699. But divesting imports of their interstate character could not have empowered states to enforce protectionist laws discriminating against imports, because it had long been established that discriminatory laws are not proper or bona fide police laws in the first place. *Supra* at 8, 11-13. Thus, by prohibiting "shipment or transportation . . . in violation of any law of such state," the Webb-Kenyon Act plainly means any *valid* police law, not an invalid discriminatory one. In 1913, no one reading the Act's language against the background of this Court's decisions would have understood its text in any other way.

That contemporaneous understanding of the words of Webb-Kenyon is confirmed by the legislative debates concerning it. Senator Kenyon introduced the bill with a lengthy account of this Court's decisions on the subject, 49 Cong. Rec. 765-69 (1912), and emphasized that under those decisions "an article may be taken out of commerce by Congress" and "that by such legislation Congress does not delegate the power to regulate commerce . . . , or . . . enlarge the police power of the States, or grant a power not possessed by them." *Id.* at 767.

Consistent with that understanding, other supporters of the bill repeatedly characterized it as subjecting imports to

the very same police laws that apply to domestic alcohol. As Senator Thornton explained:

> This bill permits the States to exercise the same police power over liquor shipped into its territory from another State that it could exercise over it if the shipment originated within its territory . . . .

49 Cong. Rec. 2912 (1913). Senator Webb likewise stated:

> We simply ask for equal justice. . . . We simply ask you "to deprive liquors intended for unlawful purposes of interstate commerce character, and let us deal with such imported liquors as we would with liquors of domestic production intended for the same unlawful purposes."

Id. at 2912-13. Senator Stone made exactly the same point:

> The pending bill . . . would in effect merely strip these particular commodities of their character as articles of interstate commerce, and thus withdraw from them the protection the Federal law now throws over them against the law and police regulations of the State. It would merely put the shipper outside of Missouri or Iowa or Arkansas upon a level, that is upon terms of equality, so far as State law and regulation go, with the shipper within the State.

Id. at 2917.

Equally telling are the arguments put forward by the opponents of the bill. They contended at great length and with great vehemence that regardless of the labels used, the bill sought to effect an unconstitutional delegation to the states of Congress's power to regulate interstate commerce. They maintained that interstate transportation – unlike the original-package sales covered by the Wilson Act – is a core aspect of interstate commerce within the meaning of the

Constitution, and that Congress was powerless to alter the constitutional division of powers simply by declaring that core interstate commerce is something else. *E.g., id.* at 2909-11 (Sen. Sutherland); *id.* at 2899-2903 (Sen. Pomerene). Yet, except for a single passing reference, the opponents never suggested that the bill was unconstitutional for the additional and far more compelling reason that it purported to authorize protectionist laws discriminating against out-of-state products.[4] Given this Court's established doctrine that discrimination against imports is inherently invalid and not a proper object of state police laws, surely the bill's erudite critics would have placed very heavy emphasis on that additional constitutional infirmity if such a reading had even been imaginable. If ever there was a case of "the dog that did not bark," this is it. *E.g., Chisom v. Roemer*, 501 U.S. 380, 396 n.23 (1991).[5]

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[4] The passing reference to the possibility of discrimination was made by Senator Root in the course of arguing that the bill was "not giving up the regulation and allowing police law to take its place. It is handing over the power of regulation to the State . . . ." *Id.* at 2915. That merely drives home the point, however, that Congress could not have authorized the states to discriminate against imports except by delegation of Congress's own power to regulate interstate commerce, something that all agreed this Court's precedents forbade.

[5] Nor is there merit to the Wholesaler Petitioners' contention that the Webb-Kenyon Act authorizes discrimination by negative implication because the law as enacted includes only the first and not the second section of the original proposed Senate bill, which Petitioners claim would have expressly outlawed discrimination. Mich. Wholesalers Ass'n Pet. Br. 24. The record is clear that, with respect to the first and section sections of the original bill, the Senators saw the "purpose sought to be accomplished by each of these sections [as] *precisely the same*, namely, to allow the State jurisdiction over intoxicating liquors to attach upon the instant that such liquors . . . cross the boundary lines of the State," but that "section 2 does directly what section 1 does indirectly." 49 Cong. Rec. at 2903-04 (Sen. Sutherland) (emphasis added). The proposed second section was therefore seen by friends and foes alike as being *more*

Subsequent judicial decisions confirm that the Webb-Kenyon Act merely extended the Wilson Act so that state jurisdiction attaches at an earlier stage when imports crossed the border, without giving states an unprecedented and constitutionally dubious power to discriminate against imports. In *James Clark Distilling Co. v. Western Maryland Railway Co.*, 242 U.S. 311 (1917), a divided Court upheld the constitutionality of Webb-Kenyon as it applied to a nondiscriminatory West Virginia prohibition law that "forbade the shipment into or transportation of liquor in the state, whether from inside or out." *Id.* at 321; *see also id.* at 318 (state law barred "all shipments . . . whether from within

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vulnerable than the first section to constitutional attack as a *direct* delegation of power to the states. *E.g., id.* at 830 (Sen. Kenyon) ("The first section takes certain liquor out of commerce and the second section seems to recognize it as being in," thereby creating objection that second section would be direct delegation to states of power over interstate commerce rather than removal of immunity); *id.* at 2914 (Sen. Root) (stating with respect to second section that "the friends of the bill have practically conceded that it is not constitutional"); *id.* at 2919 (Sen. Borah) (stating that he could not vote for second section "entertaining the view which I do as to its unconstitutionality" but that "in regard to the first section . . . I think . . . it is not subject to the inhibition of the Constitution"). Plainly, the Senators' unanimous evaluation of the two sections' comparative constitutional vulnerabilities would have been exactly the opposite – the first section would have been more objectionable than the second – if they had entertained any notion that the former actually allowed discrimination while the latter did not. There is not one hint of that in the legislative debates. Ultimately, the sponsors of the Senate bill moved to strike the second section simply because it had not been part of the bill already passed by the House, "in the hope [that the bill] will more likely become a law than if we send the Senate bill to the House as a separate and independent measure, couched in different language from that which is employed in the House bill." *Id.* at 2918 (Sen. Gallinger). In short, the deletion of section 2 from the original Senate bill cannot in any way support the negative inference that the remaining section that was passed into law was somehow intended to authorize discrimination.

or without the state"). The Court observed that though the Wilson Act allowed states to regulate sales in the original package *after* receipt in state, "the right to receive liquor was not affected by the Wilson Act" and so had remained beyond the reach of state police laws. *Id.* at 323. Given this history, the Court construed Webb-Kenyon as simply extending the Wilson Act's rule to imports prior to receipt, as well as after:

> Reading the Webb-Kenyon Law in the light . . . thrown upon it by the Wilson Act and the decisions of this court which sustained and applied it, there is no room for doubt that it was enacted simply to extend that which was done by the Wilson Act; that is to say, its purpose was to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in states contrary to their laws . . . .

Id. at 323-24.

Hence, as the Webb-Kenyon Act simply "took the protection of interstate commerce away from all receipt and possession of liquor prohibited by state law," *id.* at 325, "[t]he argument as to delegation to the states rests upon a mere misconception." *Id.* at 326. The Court therefore concluded:

> As the power to regulate which was manifested in the Wilson Act, and that which was exerted in enacting the Webb-Kenyon Law, are essentially identical, the one being but a larger degree of exertion of the identical power which was brought to play in the other, we are unable to understand upon what principle we could hold that the one was not a [constitutional] regulation without holding that the other had the same infirmity . . . .

Id. at 330.

Although *James Clark* did not directly present or address the question of discrimination against imports, its rationale makes clear that discrimination is no more permissible under the Webb-Kenyon Act than under the Wilson Act. The later law was but the extension of the earlier, enacted pursuant to the identical power, so that it applied to imports from the moment they crossed the border. Neither statute was an unconstitutional delegation of the commerce power, because both merely removed an immunity from otherwise lawful state police regulation. In short, under the Webb-Kenyon Act as under the Wilson Act, "evidently equality or uniformity of treatment under state laws was intended." *Scott*, 165 U.S. at 100.

Exactly that was the conclusion reached in the only case we have found that directly addressed the enforceability of a discriminatory state law under the Webb-Kenyon Act. *See Brennan v. Southern Express Co.*, 90 S.E. 402 (S.C. 1916). That case concerned South Carolina's alcohol regulations, which had also been at issue in both *Scott* and *Vance*. *Brennan* addressed the validity of the state's laws at two different times: an earlier period in which the state overtly discriminated against imports in favor of domestic sales, and a later period in which that discrimination had been replaced by evenhanded regulation. *Id.* at 403-04. Anticipating this Court's decision a few months later in *James Clark*, the South Carolina court upheld the enforceability of the later, *evenhanded* state law under Webb-Kenyon. Specifically, the court rejected the argument that under Webb-Kenyon a state law could not forbid importation unless it also prohibited use, explaining:

> If absolute prohibition does not offend the Constitution, by what power of reasoning can it be asserted that the lesser exertion of power in a measure of restriction and regulation does, *provided, of course, it be equal and uniform in application and operation*.

Id. at 406 (emphasis added); *accord James Clark*, 242 U.S. at 324-25 (reaching same conclusion).

The validity of the state law when it discriminated against imports was quite another matter. The South Carolina court reasoned that the question had been squarely decided in *Scott*, and that the subsequent enactment of the Webb-Kenyon Act did not change the result. 90 S.E. at 403-04.

> [F]or, while that act does divest intoxicating liquors . . . of their interstate character and withdraw from them the protection of interstate commerce, it evidently contemplated the violation of only *valid* state laws. It was not intended to confer and did not confer upon any state the power to make injurious discriminations against the products of other states . . . .

Id. at 404 (emphasis added) (observing also that "the same thing was said in Scott v. Donald of the Wilson Act . . . , by which Congress made liquors shipped into a state subject to its laws after delivery thereof to the consignee. The principle there decided was reaffirmed in *Vance* . . .").

That was where the law stood when the 18th Amendment was ratified in 1919.

D. After Prohibition, Section 2 Restored and Constitutionalized the States' Power Under Webb-Kenyon to Regulate Imported Alcohol, But Did Not Create a New Power to Discriminate.

The balance struck by the Webb-Kenyon Act was violently disrupted by the 18th Amendment, which nationalized and constitutionalized a matter that had until then been committed to the states: police laws regulating

alcohol. That radical departure from historical practice was a notorious failure. As Senator Wagner explained, arguing for repeal:

> [T]he question which has troubled the American people since the eighteenth amendment was added to the Constitution was not at all concerned with liquor. It was a question of government; how to *restore* the constitutional balance of power and authority in our Federal system which had been upset by national prohibition.

76 Cong. Rec. 4144 (emphasis added).

Accordingly, the repeal of the 18th Amendment did not simply supplant nationwide prohibition with nationwide free-trade in alcohol. Instead, it sought to restore the balance in federal and state power that had prevailed before 1919. That purpose is reflected in the language of Section 2 itself, which is directly based upon the language of the Webb-Kenyon Act.[6] Indeed, as Petitioners concede, Section 2 wrote the Webb-Kenyon Act into the Constitution, thereby permanently restoring the scope of state power as it existed immediately prior to Prohibition. Mich. Wholesalers Ass'n Pet. Br. 16; *see also* Mich. Pet. Br. 38.

The inclusion of Section 2 in the Amendment repealing Prohibition was thought necessary to ensure that the states

[6] *Compare* U.S. Const. amend. XXI, § 2 ("The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited"), *with* 37 Stat. 699-700 ("That the shipment or transportation . . . of any . . . intoxicating liquor . . . from one State, Territory, or District of the United States . . . into any other State, Territory, or District . . . which . . . intoxicating liquor is intended . . . to be received, possessed, sold, or in any manner used . . . in violation of any law of such State, Territory, or District . . . is hereby prohibited").

would have the power to enforce their local alcohol policies and, in particular, that the dry states could remain dry. As one congressman explained, Section 2 would "aid and protect the so-called dry States in permitting them to exclude, if their citizens so wish, all liquor traffic in their domains." 76 Cong. Rec. 4526 (1933) (Rep. Herney).[7]

To be sure, the states could already exercise that power under the Webb-Kenyon Act. But that statutory measure was deemed to be inadequate assurance for the dry states, for two reasons: it could be repealed by a simple act of Congress, and it could be held unconstitutional by this Court. Senator Borah drove those points home in an eloquent plea for the inclusion of Section 2 in the Amendment. He reminded the Senate that the constitutionality of Webb-Kenyon had been sustained by a divided Court in *James Clark*, and that many eminent jurists – including President (later Chief Justice) Taft, Senator Elihu Root, and Senator (later Justice) Sutherland – had all argued against the law's constitutionality. 76 Cong. Rec. 4170. Moreover, as soon as the Act was sustained in *James Clark*, a campaign had been waged to repeal it in Congress, or to challenge it again in this Court. *Id.* Senator Borah therefore warned that, without Section 2,

> we are turning the dry States over for protection to a law which is still of doubtful constitutionality and

[7] *See also id.* at 4171 (Sen. Wagner) (stating no objection to Section 2 "if the dry States want additional assurance that they will be protected . . ."); *id.* at 4517 (Rep. McLeod) (describing Section 2 as "the added section of protection for dry States"); *id.* at 4518 (Rep. Robinson) ("Section 2 attempts to protect dry States"); *id.* at 4159 (Rep. Garber) ("[Section 2], it is claimed, will protect the dry States"); *id.* at 4523 (Rep. McSwain) ("[I]f 36 States should act in favor of ratifying this proposed amendment, then, undoubtedly, each and every State in the Union could be just as dry as its own laws make it . . .").

> which, as it was upheld by a divided court, might very well be held unconstitutional upon a re-presentation of it. [In addition,] we are asking the dry States to rely upon the Congress of the United States to maintain indefinitely the Webb-Kenyon law

Id.

Senator Borah then turned to describing what would happen if Webb-Kenyon were repealed or struck down. He recalled that after this Court's decision in *Leisy v. Hardin*, "[t]he States ... were powerless to protect themselves against the importation of liquor into the States" *Id.* at 4171 (adding that "[t]here never was any real chance for the dry States to enforce their laws after the decision which was made in the case of Leisy against Hardin[]"). He then summed up the devastating effects of nullifying "the right of the States, in the exercise of the police powers, to control the liquor traffic within the States," and concluded:

> All this was sought to be remedied by the Webb-Kenyon Act, and I am very glad indeed [other Senators have] seen fit to recognize the justice and fairness to the states of incorporating it permanently in the Constitution of the United States.

Id. at 4172.

Exactly the same understanding of Section 2 as incorporating Webb-Kenyon in the Constitution is demonstrated by Senator Blaine's report of the views of the Judiciary Committee in proposing the Section. He began by reviewing the Wilson and Webb-Kenyon Acts, through which "Congress itself regulated interstate commerce to the

point of removing all immunities of liquor in interstate commerce." *Id.* at 4140.[8] But, Senator Blaine observed,

> [i]n the case of Clark against Maryland Railway Co. there was a divided opinion [sustaining the Webb-Kenyon Act]. There has been a divided opinion in respect to the earlier cases, and that division of opinion seems to have come down to a very late day. So, to assure the so-called dry States against the importation of intoxicating liquor into those States, it is proposed to write permanently into the Constitution a prohibition along that line.

Id. at 4141.

In short, Section 2 was understood by all as incorporating the Webb-Kenyon Act directly into the Constitution, thereby permanently restoring the states' ability to enforce their police laws against imported and domestic alcohol alike. That is consistent with the very language of Section 2, taken directly from Webb-Kenyon itself. Like Section 1 of the Amendment repealing Prohibition, Section 2 both restored the status quo ante and permanently enshrined it in the Constitution.

That understanding of the language and purpose of Section 2 is also consistent with the Senate's decision to strike the original proposed resolution's Section 3. Section 3 would have given Congress a completely novel police power, concurrent with the states, "to regulate or prohibit the sale of intoxicating liquors to be drunk on the premises where sold." 76 Cong. Rec. 4138. Unlike Section 2, which sought to restore the balance of state and federal powers by

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[8] The quoted words actually came from Senator Wagner, after which Senator Blaine said, "I thank the Senator. I think he has given the correct statement of the doctrine." *Id.*

constitutionalizing the Webb-Kenyon Act, Section 3 would have continued the flaws of Prohibition by giving Congress a power it never had before 1919. As Senator Wagner explained:

> I am in sympathy with that purpose [of preventing the return of the saloon]; but the suggested method of accomplishing it – the proposal that it shall continue to be the responsibility of the Federal Government – is all wrong. It flies in the face of reason and experience. If the Federal Government failed to discharge that responsibility under the all-embracing prohibition of the eighteenth amendment, what folly is it which prompts anyone to believe that it can discharge it under the milder language of the pending resolution?

76 Cong. Rec. 4145.[9]

Senator Blaine similarly criticized Section 3 for upsetting rather than restoring the pre-Prohibition balance. Because his remarks on this point have sometimes been misconstrued as evidence that Section 2 was intended to give states *unlimited* power to regulate alcohol, they are worth quoting at some length:

> I am now endeavoring to give my personal views [criticizing Section 3]. The purpose of section 2 is to restore to the States by constitutional amendment absolute control in effect over interstate commerce

[9] Similarly, numerous Senators criticized Section 3 because it would have perpetuated another novel aspect of the 18th Amendment: giving state and national governments "concurrent power" rather than maintaining separate spheres. *See* 76 Cong. Rec. 4143 (Sens. Blaine and Wagner); *id.* at 4145-46 (Sens. Walsh and Wagner); *id.* at 4155 (Sens. Walsh and Brookhart); *id.* at 4161-62 (Sens. Brookhart and Norris); *id.* at 4173 (Sens. Borah, Hastings, and Black).

> affecting intoxicating liquors which enter the confines of the States. The State under section 2 may enact certain laws on intoxicating liquors, and section 2 at once gives such laws effect. Thus the States are granted larger power in effect and are given greater protection, while under section 3 the proposal is to take away from the States the power that the States would have in the absence of the eighteenth amendment. My view therefore is that section 3 is inconsistent with section 2 . . . and that section 3 ought to be taken out of the resolution.

Id. at 4143.

Senator Blaine's overall point in this passage is that, by giving Congress police powers it never possessed pre-Prohibition, Section 3 is inconsistent with "[t]he purpose of section 2 . . . to *restore* to the States . . . absolute control." *Id.* (emphasis added). In this context, the phrase "absolute control" does not mean a power uncabined by any other constitutional constraints, but rather a power that is absolute in the sense that it is *independent of Congress*, not shared concurrently with Congress. And by "restor[ing]" the states' preexisting power "by constitutional amendment," the states are "granted larger power in effect and are given greater protection," in the sense that this power cannot be repealed by Congress or struck down by the judiciary. *Id.* In short, Senator Blaine's comments simply reflect the consensus that Section 2 simultaneously restored the status quo ante and made it more secure by writing Webb-Kenyon into the Constitution itself. Thus, while his "personal views" critical of Section 3 departed from the Judiciary Committee's, his statements concerning Section 2 were entirely consistent with the Committee's views, reported earlier by Senator Blaine himself, that Section 2 restored the pre-Prohibition balance under the Webb-Kenyon Act by "writ[ing] permanently into

the Constitution a prohibition along that line." *Id.* at 4141 (Sen. Blaine's report of Judiciary Committee views); *see supra* at 25-25 (discussing same).

Although less specifically focused on this issue, the views expressed at the states' ratifying conventions are also consistent with the overall theme that the 21st Amendment would restore the balance between federal and state authority that existed before Prohibition. For example, the President of the Kentucky convention argued that "in thus amending the Constitution we are not tearing down. We are doing a constructive work of restoration . . . ." *Ratification of the Twenty-First Amendment to the Constitution of the United States: State Convention Records and Laws* 169 (Edward Somerville Brown, ed. 2003). Similarly, a delegate at the Pennsylvania convention described the 21st Amendment as an "opportunity to reclaim for the Commonwealth of Pennsylvania the sovereignty . . . which was, I regret to say, abdicated in the early part of 1919." *Id.* at 355-56.

In sum, as the very language of Section 2 tracking the Webb-Kenyon Act makes clear, the Section permanently restored the power of the states under Webb-Kenyon to regulate alcohol imports on equal terms with the domestic product. By eliminating the absolute immunity from state regulation that such imports would otherwise have possessed absent congressional action, Section 2 substantially modified the rule that would otherwise have applied under the Commerce Clause, as it had been repeatedly interpreted by this Court. But this Court's prior cases made equally clear that eliminating the interstate commerce immunity for imported alcohol only allows the states to enforce otherwise valid state laws, such as evenhanded police regulations, and that protectionist or discriminatory state laws are inherently invalid. No one familiar with the legal history of this subject

could read Section 2 as giving states a new power to discriminate against the products of other states.

Accordingly, by prohibiting transportation or importation in violation of state laws, Section 2 "evidently contemplate[s] the violation of only *valid* state laws. It was not intended to confer and did not confer upon any state the power to make injurious discriminations against the products of other states . . . ." *Brennan*, 90 S.E. at 404 (discussing Webb-Kenyon Act) (emphasis added). Under Section 2, as under the Wilson and Webb-Kenyon Acts,

> a [state] law may forbid entirely the manufacture and sale of intoxicating liquors, and be valid; or it may provide equal regulations for the inspection and sale of all domestic and imported liquors, and be valid. But the state cannot . . . establish a system which, in effect, discriminates between interstate and domestic commerce . . . .

Scott, 165 U.S. at 100 (discussing Wilson Act).

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals holding that the 21st Amendment does not authorize discriminatory or protectionist state laws, should be affirmed.

Respectfully submitted,

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JENNIFER M. GRANHOLM, et al.,

Petitioners,

v.

ELEANOR HEALD, et al.,

Respondents.

MICHIGAN BEER &
WINE WHOLESALERS ASSOCIATION,

Petitioner,

v.

ELEANOR HEALD, et al.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF THE GOLDWATER INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTERESTS OF THE *AMICUS CURIAE*[1]

The Goldwater Institute, established in 1988, is a nonprofit, independent, nonpartisan, research and educational organization dedicated to the study of public policy. Through its research papers, editorials, policy briefings and forums, the Institute advocates public policies founded upon the principles of limited government, economic freedom and individual responsibility. One of the central missions of the Goldwater Institute is studying and promoting the elimination of government burdens on commerce and trade.

SUMMARY OF THE ARGUMENT

The U.S. Constitution does not permit states to interfere with interstate commerce by enacting invidious and partial restraints on the flow of goods. The Commerce Clause also prevents differential treatment of in-state and out-of-state interests. Although Sec. 2 of the Twenty-first Amendment provides a means for state regulation of alcoholic beverages, it doesn't allow for discrimination against out-of-state interests. Accordingly, the Court should strictly scrutinize any state restrictions.

State schemes such as those in Arizona and Michigan do not narrowly address core concerns and are mostly designed to protect in-state liquor interests. A recent Goldwater Institute study confirmed that regulatory

[1] This brief is filed with the consent of the parties. No counsel to any of the parties to this matter authored this Brief in whole or in part. No person or entity other than the *amicus curiae* made a monetary contribution to the preparation and submission of this brief.

schemes such as those in Arizona greatly reduce consumer choice. Wines that are readily available on the internet are not otherwise available for purchase by Arizona consumers. Removing such state barriers will provide greater consumer choice and encourage continued e-commerce.

ARGUMENT

I. INTRODUCTION

Arizona is one of two dozen states that prohibit the direct shipment of out-of-state wine to consumers. Although the number of nationwide wineries and available wines has grown dramatically over the past thirty years, wholesalers continue to dictate the availability of out-of-state wines to Arizona consumers. This is done through a three-tiered distribution system.

The three-tiered distribution system requires that out-of-state producers sell their products to licensed wholesalers (tier 1), who then sell to retailers (tier 2), who make a selection of beverages available for sale to consumers (tier 3). Under Arizona law, an out-of-state producer's failure to use a licensed wholesaler is illegal. Ariz. Rev. Stat. § 4-243.01.[2] Domestic wineries, however, are not prohibited from directly selling and shipping to consumers. Ariz. Rev. Stat. § 4-205.04.[3] Because of Arizona's current prohibition on direct shipping, however, visitors

[2] See also Ariz. Rev. Stat. § 4-244; 19 Ariz. Admin. Code (A.C.C.) R1-202 – 1-204.

[3] See also Ariz. Rev. Stat. §§ 4-203.03, 4-203.04.

from several states cannot order directly from Arizona wineries. Specifically, California, Colorado, Hawaii, Idaho, Illinois, Iowa, Minnesota, Missouri, New Mexico, Oregon, Washington, West Virginia and Wisconsin are all "reciprocity" states. As a result of Arizona law prohibiting the direct shipment by out-of-state wineries, those states will not allow consumers located in their jurisdictions to order and directly purchase Arizona wine.[4]

A 2003 report by the Federal Trade Commission concluded that such bans on interstate direct shipping represent the single largest barrier to expanded e-commerce in wine.[5] The report also concludes that consumers would reap significant benefits if they had the option of purchasing wines online from out-of-state sources.[6] The benefits include a much greater variety of wine, lower costs, and the convenience of home delivery.[7]

II. STATE LIQUOR DISTRIBUTION SCHEMES THAT FAVOR IN-STATE OVER OUT-OF-STATE INTERESTS VIOLATE THE COMMERCE CLAUSE

The United States Constitution grants Congress the power to "regulate commerce with foreign Nations and among the several States and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 4. James Madison explained that

[4] See Wine Institute, Industry Background and Statistics (at <http://www.wineinstitute.org>) (accessed, Sept. 20, 2004).

[5] Staff of the Federal Trade Commission., "Possible Anticompetitive Barriers to E-Commerce: Wine," F.T.C. Report., July 3, 2003.

[6] *Id.*

[7] *Id.*

such a provision is necessary to ensure that states do not impose levies on imports and exports passing through their jurisdictions.[5] In other words, the Commerce Clause is intended to avoid the tendency toward economic Balkanization. *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979). It does this by keeping commercial intercourse among the States free from "invidious and partial restraints." *Gibbons v. Ogden*, 22 U.S. 1, 231 (1824). Chief Justice Marshall elaborates in *Gibbons* that, "[if] there was any one object riding over every other in the adoption of the Constitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints."

In addition to the affirmative authority conferred upon Congress, the Commerce Clause also provides an implied limitation on state regulation affecting interstate commerce. Early on, the Supreme Court recognized the notion of a "dormant" Commerce Clause. *Wilson v. Black Bird Creek Marsh*, 27 U.S. 245 (1829) (a state law may be invalid if it is "repugnant to the power to regulate commerce in its dormant state"). The dormant Commerce Clause prevents differential treatment of in-state and out-of-state interests. *Dennis v. Higgins*, 498 U.S. 439, 447 (1991); see also, *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273 (1988) ("the Commerce Clause not only grants Congress the authority to regulate commerce among the States, but also directly limits the power of the States to discriminate against interstate commerce"). Thus, any state laws that are intended or actually benefit in-state economic interests at the expense of out-of-state interests are prohibited. *Oregon Waste Systems v.*

[5] James Madison, *The Federalist Papers* No. 42 (Clinton Rossiter ed., 1961).

Dep't of Environmental Quality, 511 U.S. 93, 99 (1994); see also, *South-Central Timber Dev. v. Wunnicke*, 467 U.S. 82, 87 (1984) ("the [Commerce] Clause has long been recognized as a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce"). The Supreme Court has held that the fundamental purpose of the dormant Commerce Clause is to eliminate economic protectionism by preventing states from providing advantages for its residents at the expense of non-residents in matters of interstate commerce. *General Motors v. Tracy*, 519 U.S. 278, 299 (1997).

The Twenty-first Amendment, U.S. Const. amend. XXI, and the Commerce Clause both are parts of the United States Constitution. Accordingly, each should be read or interpreted in light of the other. As the Court noted in *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, the Twenty-first Amendment did not "repeal" the Commerce Clause's relevance to state regulation of intoxicating liquors. *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 331-32 (1964) (holding that such a result "would be patently bizarre and is demonstrably incorrect"). Clearly, if the commodity at issue were grain or lumber, rather than liquor, there would be no dispute that regulations imposed by states are unconstitutional. *Id.* at 329. For example, state laws limiting the length of trucks on roadways, *Raymond Motor Transp. v. Rice*, 434 U.S. 429 (1978), the importation of waste, *Philadelphia v. New Jersey*, 437 U.S. 617, 620 (1978), and the transportation of fish, *Hughes v. Oklahoma*, 441 U.S. 322 (1979), have all been invalidated as impeding the free flow of commerce between the states.

In one of the most important cases decided after *Hostetter*, this Court was confronted with the issue of a

Hawaii tax exemption for locally produced alcoholic beverages. *Bacchus Imports v. Dias*, 468 U.S. 263 (1984).[9] In striking down that statute, this Court determined that Hawaii's tax exemption expressly reflected a discriminatory intent and was thus incapable of withstanding strict scrutiny review. *Id.* at 273. The Court also expressed that whatever the scope of the Twenty-first Amendment, its purpose was not to allow states to favor local liquor industries by erecting competitive barriers. *Id.* at 276.

The Supreme Court did recognize that temperance or other core concerns may be used to justify a state statute that interferes with interstate commerce. *Id.* This test, normally referred to as the "core concerns" analysis, examines state liquor statutes in light of recognized concerns such as temperance, prevention of monopolies, *Healy v. Beer Institute,* 491 U.S. 324, 342-43 (1989), and the collection of state taxes, *North Dakota v. United States*, 495 U.S. 423, 432 (1990). The existence of core concerns, however, does not eliminate the burden a state has in establishing that its discriminatory laws are the only means available to advance or protect those core concerns. The statutory schemes in both Arizona and Michigan fail to meet this test.

[9] See *Brown-Forman Distillers v. N.Y. Liquor Auth.*, 476 U.S. 573 (1986) at 584, citing *Bacchus Imports v. Dias, supra*, for the proposition that state regulation of alcohol is reviewable under the Commerce Clause.

III. STATE REGULATORY SCHEMES PROHIBITING THE DIRECT SHIPMENT OF WINE DO NOT NARROWLY ADDRESS STATE CONCERNS AND CREATE UNREASONABLE BARRIERS TO CONSUMER CHOICE

Because distribution systems such as those in Arizona and Michigan are discriminatory on their face, courts should apply a strict scrutiny standard when evaluating whether those statutes offend the Commerce Clause. Only narrowly tailored statutes that directly address legitimate state core concerns will be upheld. See *Capital Cities Cable v. Crisp*, 467 U.S. 691 (1984); accord *Bacchus Imports v. Dias, supra*; accord *West Lynn Creamery v. Healy*, 512 U.S. 186 (1994) (holding that "preservation of local industry by protecting it from the rigors of interstate competition is the hallmark of the economic protectionism that the Commerce Clause prohibits"). Arizona's statutes do not address the core concerns of temperance, prevention of consumption by minors, orderly market conditions or tax collection. The existing Arizona statutory scheme is designed to favor domestic wine products.

Reasonable measures can be added to state statutes to address core concerns and ensure alcoholic beverages are not delivered to minors. For example, other jurisdictions have implemented safeguards requiring the purchaser to provide a driver license number and credit card at the time of purchase or requiring the shipping agent to obtain proof upon delivery that the recipient is at least twenty-one years of age.[10] Moreover, there are no records to

[10] Va. Code Ann. § 4.1-112.1. Virginia law is similar to laws in other jurisdictions (e.g., Ga. Code Ann. § 3-6-31, La. Rev. Stat. Ann. § 26:359),

(Continued on following page)

suggest that temperance is even a concern or issue in Arizona.[11] Additionally, a recent report published by the Federal Trade Commission concluded that states with direct shipping have experienced few or no problems with shipments to minors.[12] Also, minors can already order (theoretically) on the Internet from wineries, thus, this is not a "new" or unique concern.

Another recognized core concern potentially justifying potential discrimination is the pursuit of "orderly market conditions." After the repeal of Prohibition, there was a concern that organized crime would continue to control the distribution of alcoholic beverages. *Dickerson v. Bailey*, 212 F.Supp.2d 673, 679-80 (S.D.Tex. 2002). Thus, many states adopted a three-tiered system to ensure "orderly market conditions."

Such concerns are of little relevance today and the phrase now is a euphemism for "wholesaler protection." The three-tiered system has created an environment where fewer and fewer wholesalers control more and more product.[13] For instance, one Arizona wholesaler, Southern

and demonstrates that reasonable methods exist to address the potential for minors to receive shipped wine.

[11] On September 19, 2003, the Arizona Department of Liquor responded to a Goldwater Institute public records request by stating that, "The Department of Liquor Licenses and Control does not maintain records of citations or prosecutions concerning the importation of liquor into the state by minors. We have no historical record available on this subject matter."

[12] Federal Trade Commission, *Possible Anticompetitive Barriers to E-Commerce: Wine* (July 3, 2003). According to the report, states allowing for the direct sale and shipment of wine have not experienced any significant problems with underage consumption.

[13] The number of "wholesalers" of alcoholic beverages has decreased by over 75 percent over the past thirty years. At the same time,

(Continued on following page)

Wine & Spirits, has benefited from the continuing consolidation. Its eight-state operation brings in over $2 billion in annual revenue and Southern controls about 11 percent of all domestic wine and liquor consumption.[14] Not surprisingly, wholesalers have been the leading opponents of any change to the three-tiered distribution system.[15]

The last core concern that a state may invoke to justify curtailing the direct shipment of wine by out-of-state producers is that the shipment across state lines may impair revenue or tax collection. By itself, revenue generation is not a local interest that can justify discrimination against interstate commerce. *C&A Carbone v. Town of Clarkstown*, 511 U.S. 383 (1984). Moreover, the basis for such a concern is mostly speculative. For instance, if Arizona can collect taxes on shipments from in-state wineries, there is no reason why it cannot collect taxes on shipments from out-of-state wineries. For tax purposes, alcoholic beverages should be treated the same way as any other catalog, telephone, or Internet purchase. If the state can collect taxes on shipments of clothes or furniture from

the number of wineries has increased over 500 percent. Thus, less than 17 percent of wineries are represented by distributors in all fifty states. Free the Grapes, Issue Summary (at <http://www.freethegrapes.org>) (accessed, Sept. 20, 2004).

[14] See, Alix M. Freedman & John R. Emshwiller, *Vintage System: Big Liquor Wholesaler Finds Change Stalking its Very Private World*, Wall Street Journal, p. A1 (Oct. 4, 1999).

[15] Wall Street Journal Editorial Board, *A Vintage Ruling*, Wall Street Journal, p. A8 (Apr. 5, 2002); see also, *A bill to allow direct shipment of out-of-state wines received heavy opposition from lobbyists for wine distributors and retailers*, East Valley Tribune, p. A6 (Sept. 17, 2003).

out-of-state, there is no reason why it cannot do the same with wine.[16]

Although e-commerce sales have continued to rise, traditional brick-and-mortar retailers and wholesalers have opposed increased Internet transactions.[17] In testimony concerning state impediments to e-commerce before the U.S. House of Representatives, Ted Cruz, Director of the Office of Policy and Planning of the Federal Trade Commission, stated that existing businesses may be seeking to use government authority to impede new entrants from competing.[18] Thus, American consumers are paying at least $15 billion more for goods and services as a result of e-commerce protectionism.[19]

Wine, unlike many other consumer goods, is unique. Wines are distinguished not only by color and region, but by the soil used to grow the grapes and the barrels in which they are stored or aged. Accordingly, every bottle of

[16] Arizona could condition a direct shipping permit upon the collection of taxes. Several states have enacted similar legislation to ensure out-of-state wineries pay taxes on shipments to in-state consumers. See La. Rev. Stat. Ann. § 26:359(B); N.H. Rev. Stat. Ann. § 178:14a(V); Nev. Rev. Stat. Ann. § 369.462.

[17] U.S. Department of Commerce, U.S. Department of Commerce News, 2nd Quarter 2002 release (Aug. 22, 2002) E-commerce sales increased almost ten times greater than retail sales over a comparable quarter.

[18] Ted Cruz, *Prepared Statement of the Fed. Trade Comm'n: Before the Subcomm. On Commerce, Trade, and Consumer Prot. Comm. on Energy and Commerce*, U.S. House of Representatives, 107th Cong. (September 22, 2002).

[19] Robert D. Atkinson, *Revenge of the Disintermediated: How the Middleman is Fighting E-Commerce and Hurting Consumers*, Progressive Policy Institute (Jan. 26, 2001); see also, Brian Sullivan, *FTC says states' e-commerce laws hurt consumers*, ComputerWorld (July 18, 2002).

wine truly is distinct. Given the wide variety available, as well as recent studies suggesting the health benefits of wine,[20] it should not be surprising that Americans are drinking more wine than ever before.[21]

Distribution systems such as those in Arizona and Michigan whereby retailers must buy wines from a limited number of licensed wholesalers limit retailers to

[20] Peter Jaret, medically reviewed by Gary D. Vogin, MD, *Bottoms Up: To Your Health*, WebMD Feature Archive 2001 (at <http://my.webmd.com/content/article/14/1671_51501.htm?lastselectedguid={5FE84E90-BC77-4056-A91C-9531713CA348}>) (accessed, Sept. 20, 2004), cites numerous studies that report the health benefits of wine, including: *Annals of Internal Medicine*, September 2000, reporting that light drinkers of wine cut risks of dying prematurely by one year; the *European Heart Journal*, January 2000, found that drinking wine appears to dilate arteries and increase blood flow reducing the risk of heart problems; scientists published in the journal *Pharmacology, Biochemistry, and Behavior*, May 2000, found that men and women around the age of 32 who had a glass or two of wine each day had significantly higher levels of "good" cholesterol because they remove the "bad" artery-clogging cholesterol before they can choke blood vessels; the *Journal of Nutrition and Biochemistry*, November 2000, reported similar findings, and found that the reduction of artery-clogging cholesterol reduced the likelihood of cardiovascular disease, such as heart disease and stroke; the *Journal of Cellular Biochemistry*, June 2000, reported that drinking wine in moderation may slow the growth of breast and prostate cancer cells; *Oncology Reports*, July-August 2000, similarly found that wine consumption can slow down the growth of liver cancer cells; additionally, the *Journal of the American Dental Association*, June 2000, found that wine consumption may inhibit the growth of oral cancer cells; a report in the *American Journal of Epidemiology*, April 2000, showed that women who drank one to three glasses of wine had greater bone mineral density; similarly, *Osteoporosis International*, November 2000, found that men, age 54-63, who drank a glass or two of wine a day also showed signs of greater bone mineral density.

[21] Wine Institute, Industry Background and Statistics (at <http://www.wineinstitute.org>) (accessed, Sept. 20, 2004).

essentially the same selection of wine. This restricts consumers' freedom of choice. While the opportunities are ample, the actual freedom to purchase wine from the vast Internet marketplace is extinguished under regulatory schemes such as those in Arizona and Michigan.

The Goldwater Institute recently conducted a study of the availability of a broad cross-section of wines.[22] A random variety of wines was selected. Some wines were regional selections, while others were from popular wineries with special vintages. All of the wines, absent Arizona regulations, were available for online purchase and direct delivery to the consumer. However, in a sampling of 15 specialty wines readily available for sale on the Internet, only two could be obtained from Arizona retailers, and one was available as to brand and variety, but not vintage. The other 12 could not be obtained at all. Clearly, consumer options are greatly diminished with state regulations that impede the direct shipment of out-of-state wines.

Prohibitions on the direct shipment of out-of-state wines not only leaves consumers with fewer choices, but the system also hurts local wineries by limiting their ability to ship wines to numerous jurisdictions. Large wholesalers, who benefit the most from the three-tiered distribution system, continue to oppose any changes.

Because distribution schemes such as those in Michigan unnecessarily discriminate against out-of-state producers, they should be struck down as contrary to the U.S. Constitution. Such a result will provide wine consumers with the benefit of a free market: more choice,

[22] Jennifer Wright, *Stomping Grapes: How Arizona Tramples Consumer Choice in Wine*, Goldwater Institute (September 22, 2004).

greater convenience and lower prices. It will serve as a model for e-commerce trade as well.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

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Nos. 03-1116, -1120 and -1274

IN THE

Supreme Court of the United States

JENNIFER M. GRANHOLM,
GOVERNOR OF MICHIGAN, *et al.*, *Petitioners*,
v.
ELEANOR HEALD, *et al.*, *Respondents*.

MICHIGAN BEER & WINE WHOLESALERS ASSOCIATION,
Petitioner,
v.
ELEANOR HEALD, *et al.*, *Respondents*.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

JUANITA SWEDENBURG, *et al.*, *Petitioners*,
v.
EDWARD D. KELLY, CHAIRMAN,
NEW YORK DIVISION OF ALCOHOLIC BEVERAGE CONTROL,
STATE LIQUOR AUTHORITY, *et al.*, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF *AMICUS CURIAE* OF ILLINOIS ALCOHOLISM AND DRUG DEPENDENCE ASSOCIATION IN SUPPORT OF PETITIONERS IN *GRANHOLM* AND RESPONDENTS IN *SWEDENBURG*

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QUESTION PRESENTED

Does a State's regulatory scheme that permits in-state wineries directly to ship alcohol to consumers but restricts the ability of out-of-state wineries to do so violate the dormant Commerce Clause in light of Section 2 of the 21st Amendment?

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CONSENT TO FILE

Consents to the filing of any *amicus* briefs in each of the consolidated cases were filed by the parties on July 9, 2004, July 13, 2004 and July 14, 2004.

INTEREST OF *AMICI*[1]

The Illinois Alcoholism and Drug Dependence Association (IADDA) is an Illinois-based not for profit established in 1967. IADDA is involved in professional training, career development and advocacy for providers in the field of alcohol and drug dependency prevention, counseling and diversion. IADDA represents more than 100 prevention and treatment agencies. A list of its members is attached in the Appendix.

IADDA advocates for sound public policy to foster healthier families and safer communities. Its objectives are to work for effective treatment for addicted or drug-dependent people and for prevention, particularly among youth. Its public policy advocacy works to promote healthier individuals and safer communities by helping avoid the problems of dependence.

IADDA partners with two prevention programs. One, Illinois Teen Institute, operates an acclaimed prevention and positive peer influence program directed at teenagers. It involves youth in community planning for prevention of addiction and dependence. Its sponsored program, Teens Reaching For And Achieving Excellence (TRAX) involves teen leaders workshops around the state to

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[1] Neither party's counsel authored any portion of this brief. No person or entity other than *amici* made any monetary contribution to the preparation or submission of this brief. S. Ct. Rule 37.6.

prepare them and involve them in the anti-dependence and prevention drives. The other program, Operation Snowball, creates youth/adult partnerships to fight against use and dependence on tobacco, alcohol, and other drugs. Operation Snowball has 150 chapters working to involve communities in healthy decisionmaking.

IADDA maintains a web site linking both dependence providers and those involved in its affiliate efforts to government. http://www.iadda.org. The site facilitates access to the Illinois General Assembly, regulatory agencies, and welfare policymakers.

SUMMARY OF ARGUMENT

The Constitutional law approach to the issue of direct shipping advocated by the Sixth Circuit treats liquor like any other commodity, the untrammeled trade of which should be promoted and protected by the Commerce Clause. Such an approach is at variance with the national welfare, public opinion, and the plain language of the Twenty-First Amendment to the United States Constitution.

It is indisputable that liquor is a dangerous drug and the drug that imposes the highest social and economic costs on American society. Many authorities, including those relied upon by direct shipping advocates, recognize that states legitimately may use taxes and other regulatory measures to promote temperance and curb alcohol abuse. Particularly now with the explosive growth of Internet sales, the Sixth Circuit's approach will wreak havoc on a state's abilities to regulate and control access to this dangerous drug.

ARGUMENT

I. The Commerce Clause Has Underpinned A Strong American Economy, But Its Unfettered Application Is Not Appropriate As To Liquor

Under the Articles of Confederation that preceded the United States Constitution, import-export duties and regulations hindered the development of a national economy. *See* Adam Badawi, *Uneasy Animosities and the Public Tranquility: Political Market Failure and the Scope of the Commerce Power*, 91 Cal. L. Rev. 1331 (2003). The Commerce Clause, Article I, Section 8, Clause 3 of the Constitution, has been a major force in creating a national free market. The Commerce Clause not only expressly conveys to Congress the power to regulate interstate trade, but has long been accepted as denying that power to state governments by negative implication. *Oregon Waste Systems, Inc. v. Department of Environmental Quality*, 511 U.S. 93, 98, 114 S. Ct. 1345, 1349 (1994).

As the authorities cited by the parties in the cases now before this Court on writ of *certiorari* make clear, a notable exception to the plenary authority of Congress under the Commerce Clause is the authority -- however broad or narrow -- to regulate liquor granted to the states by Section 2 of the Twenty-First Amendment of the Constitution.

Some commentators and some decisions have found further cause or function for the negative implication of the Commerce Clause. *See, e.g.*, Douglas Smith, *Interstate Commerce and the Principles of the Law of Nations*, 2004 Utah L. Rev. 111, 131 (2004). Arguing that it provides a useful tool for invalidating protectionism or special interest legislation, they contend it has been invaluable in fostering a free market in the United States and that largely because of it,

American consumers get minimum prices and optimum economic performance. By placing the interstate portion of the economy beyond the interference of much state government regulation, the Constitution has facilitated a more *laissez-faire* economic system.

The parties opposing direct shipping laws make no attempt to hide the fact that they seek to promote and protect their ability to make liquor as widely and cheaply available as possible. In their Brief in Opposition to the Petitions for Writs of Certiorari, the Respondents in the Sixth Circuit cases open and close with references to and repeatedly cite a Report by the Staff of the Federal Trade Commission, *Possible Anticompetitive Barriers to E-Commerce: Wine 5* (July 2003) ("Report"). In the Report the staff concludes:

> states could significantly enhance consumer welfare by allowing direct shipment of wine to consumers. Through direct shipping, online wine sales offer consumers lower prices and greater selection.

Id. at 3.

There is more to the issue before this Court than free trade, however. The fact that nearly 40 state attorneys general have added their voices in favor of alcohol regulation and against open shipping testifies to that.

The American public does not believe that minimum pricing and maximum consumption is desirable for all commodities and all industries. Congress in some cases has responded to that public concern by banning or tightly regulating the commodity with Commerce Clause authority. Heroin is an example. *See* 21 U.S.C. § 841.

Alcohol is an even better example. Congress twice has placed before the states constitutional amendments to

regulate alcohol as an alternative to exclusive Commerce Clause regulation. Both were ratified by the states and both dealt with alcohol. The Eighteenth Amendment introduced Prohibition and banned alcohol. The Twenty-First Amendment repealed Prohibition and granted regulatory authority to the states over the transportation or importation of alcohol.

Courts have recognized the power of states to ban alcohol totally, *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 853 (7th Cir. 2000), to permit political subdivisions to ban it, *Allstate Beer, Inc. v. Julius Wile Sons & Co., Inc.*, 479 F. Supp. 605 (N.D. Ga. 1979), and to ban it at specific times or in particular places. *Levendis v. Cobb County*, 250 S.E.2d 460, 242 Ga. 592 (Ga. 1979); *Oklahoma Alcoholic Beverage Control Board v. Parkhill Restaurant, Inc.*, 669 P.2d 265, 1983 Ok. 77 (Ok. 1983).

Most Americans do not want to maximize the availability and consumption of alcohol by minimizing price. In a 2003 national poll by Wirthlin Worldwide, 83% of respondents agreed that Internet sales should not be allowed because they would give minors easier access to alcohol. *New Survey Confirms Majority of Americans Oppose Internet Alcohol Sales*, Oct. 22, 2003, *at* http://www.cheaphostingdirectory.com/news/20031022alcohol. (citing a 2003 WirthlinWorldwide survey). 77% of Americans oppose permitting direct sales of alcohol by Internet or mail, as do 71% of self-identified alcohol consumers, and 85% of non-drinkers. *Id.* In Texas during 2000, a poll found that 71% disagreed with the statement: "Manufactures of any product including alcoholic beverages, should have the right to sell directly to consumers over the Internet." *The Three-Tier System: Texans Overwhelmingly Reject Direct Shipment of Alcohol* (2000), *at* http://www.texassafetynetwork.org/internet/three/survey.htm

(citing a statewide public opinion poll). In Chicago, Illinois, 24 partial and 16 full precincts have voted to go "dry" since 1992. Mayor Richard Daley has noted that a "bad liquor establishment can tear the fabric of a neighborhood and send it into decline." Chicago Magazine, *The Dry Season*, July 2003.

As the foregoing illustrates, prudent use is a more favored social objective than wide-open access where liquor is concerned. This should be recognized in evaluating the competing schemes of legal analysis for state regulation of alcohol.

The Report acknowledges that "some states may explicitly pursue a policy of elevating prices above competitive levels to promote temperance." *Id.* at 26-27. In fact, the National Academy of Sciences has recommended that "Congress and state legislatures should raise excise taxes to reduce underage consumption ..." Report of the National Academy of Sciences, *Reducing Underage Drinking: A Collective Responsibility* at 11 (September 2003) *at* http://www.marininstitute.org/alcohol_policy/UnderageDrinking_Exec_Summary.

A 2002 article summarizing the economic research on the effect of price on alcohol consumption found that:

> This research, which has used a wide variety of data, generally has concluded that increases in the price of alcoholic beverages lead to reductions in drinking and heavy drinking as well as in the consequences of alcohol use and abuse.

Frank J. Chaloupka *et al.*, *The Effects Of Price On Alcohol Consumption and Alcohol-Related Problems*, 26 Nat'l. Acad.

Sci. 1, 22 (2003). One of the studies commended in the review found:

> After controlling for State and year effects, the investigators concluded that a $1 increase in the per gallon liquor tax can reduce gonorrhea rates by 2.1 percent; furthermore a beer tax increase of 20 cents per six-pack can reduce gonorrhea rates by 8.9 percent. Similar, or even somewhat larger, effects of liquor and beer taxes were found for syphilis rates.

See id. at 30.

II. Alcohol Is Responsible For More Social And Economic Damage To The American Public Than All Other Drugs Combined.

Statistics on violence, divorce, crime, fetal alcohol syndrome, spousal and child abuse, DUI killings and maimings, and lost work time clearly demonstrate the terrible social and economic cost our society pays for the imprudent use of alcohol.

The economic cost of liquor abuse in America is estimated at $185 billion, while that for illicit drugs is estimated at $161 billion. Underage drinkers and adult excessive drinkers account for an aggregate 50.1% of total alcohol consumption in the United States. Glen R. Hanson & Ting-Kai Li, *Public Health Implications of Excessive Alcohol Consumption*, 289 JAMA 8, 1031 (Feb. 26, 2003). Approximately one-third of U.S. adults exceed the guidelines defining excessive consumption. *Id.* at 1032. A recent Illinois state government survey found that 10% of eighth graders and 36% of twelfth graders reported binge drinking. Press Release, *Governor Blagojevich Calls for More Federal Funding to Prevent the Dangers of Binge Drinking: Study Shows Heavy Drinking Isn't Just on College Campuses*

(April 7, 2004). The Report that the direct shipping advocates repeatedly cite confirms what should be sobering statistics on youth access to alcohol:

> In 2002 approximately 68% of eighth graders, 85% of tenth graders, and 95% of twelfth graders said that it is "fairly easy" or "very easy" to get alcohol. Underage alcohol use imposes significant costs, in both human terms and economic terms. Although the numbers are very difficult to quantify, one study estimated that, in 1996, the total cost of underage drinking—including traffic crashes, violent crimes, burns, drowning, suicide attempts, fetal alcohol syndrome, alcohol poisoning, and treatment—was $52.8 billion.

Id. at 11.

Those numbers are significant for many reasons. Alcohol is associated with violence. The National Institute on Alcohol Abuse and Alcoholism (NIAA) has found that:

> Excessive alcohol consumption is frequently a factor in violence toward women. These events range from being the recipient of verbal aggression . . . to battery, rape, and death. Recent findings among women who reported sexual assaults include higher levels of alcohol consumption, both their own and the perpetrators, and sexual risk-taking.

NIAA, *Strategic Plan 2001-2005* at 20 *at* http://www.niaa.nih.gov. 50-60 % of male alcoholics report violent behavior toward women. *Id.*

Further, "[a]lcohol abuse is associated with high-risk sexual behavior and injection drug use, two of the major modes of human immunodeficiency virus transmission."

Hanson & Li, *supra*, at 1031. *The Christian Science Monitor* noted in a report on underage drinking that:

> experts say (sex) . . . is a factor advertisers exploit, often to the detriment of girls more than boys. 'Bad girls make good company,' reads one ad for Cuervo rum. In a Martell Cognac ad, a sultry woman is on display with a plea to 'be at least capable of bad.'

New Face of Underage Drinking: Teenage Girls, Christian Science Monitor, July 13, 2004.

The adverse impact of alcohol on the young is well-established. Drinking increases "the chances that teenagers will become adult heavier drinkers with alcohol problems later in life". Susan E. Foster, et al., *Alcohol Consumption and Expenditures for Underage Drinking and Adult Excessive Drinking*, 289 JAMA 8, 989 (Feb. 26, 2003); B.F. Grant & D.A. Dawson, *Age of Onset of Alcohol Use and its Association with DSM-IV Alcohol Abuse and Dependence: Results from the National Longitudinal Alcohol Epidemiological Survey*, J. SUBSTANCE ABUSE, 9, 103-110 (1997). Prenatal contact with alcohol is highly detrimental: "We found more serious cognitive impairment in relation to alcohol than cocaine or other drugs, including marijuana or smoking" (Dr. Sandra Jacobson, Wayne State University). Linda Carroll, *Fetal Brains Suffer Badly from Effects of Alcohol*, N.Y. Times, Nov. 4, 2003, available at http://www.nytimes.com/. "Fetal alcohol syndrome, a serious disorder affecting brain function, is the leading preventable birth defect in the U.S." *Id.*

III. Illinois' Liquor Law Is Designed To Regulate Imported Liquor

Illinois is home to many large liquor retailers, such as Sam's Wine & Spirits, Binny's, and Walgreen's. Illinois, however, has relatively few wineries and distilleries and no major breweries, so a very high percentage of the alcohol sold is imported. Illinois law looks to and derives its authority from the Twenty-First Amendment. For example, the direct shipping provision of the Illinois Liquor Control Act of 1934 provides:

> Pursuant to the Twenty-First Amendment of the United States Constitution allowing states to regulate the distribution and sale of alcoholic liquor and pursuant to the federal Webb-Kenyon Act declaring that alcoholic liquor shipped in interstate commerce must comply with state laws, the General Assembly hereby finds and declares that selling alcoholic liquor from a point outside this State through various direct marketing means, such as catalogs, newspapers, mailers and the Internet, directly to residents of this State poses a serious threat to the State's efforts to prevent youths from accessing alcoholic liquor; to State revenue collections; and to the economy of this State.

235 Ill. Comp. Stat. 5/6-29.1 (1934). *See also* Illinois Beer Industry Fair Dealing Act, 815 Ill. Comp. Stat. 720/2 ("This Act is promulgated pursuant to authority of the State under the provisions of the Twenty-First Amendment to the United States Constitution ..."); *Erfor Corp. v. State of Illinois Liquor Control Commission*, 47 Ill. App. 3d 72, 361 N.E.2d 776 (Ill. App. Ct. 1977) ("The source of state power to control alcoholic beverages is the police power as fortified by the twenty-first amendment of the United States Constitution.")

In Illinois, retailers must determine age eligibility, observe operating hours, halt bawdy conduct and gambling, prevent disorderly conduct, and must not intoxicate patrons. 235 Ill. Comp. Stat. 5/6-16; *Spiros Lounge, Inc. v. State of Illinois Liquor Control Commission*, 423 N.E.2d 1366, 1372, 98 Ill. App. 3d 280, 287 (Ill. App. Ct. 1981) (sales to minor justified revocation); *Jager v. Illinois Liquor Control Commission*, 392 N.E.2d 176, 182, 74 Ill. App. 3d 33 (Ill. App. Ct. 1979), (repeated altercations as grounds for revocation); *Show of Shows, Inc. v. Illinois Liquor Control Commission*, 230 N.E.2d 268, 271, 86 Ill. App. 2d 109 (Ill. App. Ct. 1967) (solicitation of drinks by female employee warranted revocation); *Daley v. Jack's Tivoli Liquor Lounge*, 254 N.E.2d 814, 819, 118 Ill. App. 2d 264 (Ill. App. Ct. 1969) (sexual solicitation of police officer by prostitute vouched for by bartender warranted revocation); *Daley v. Rifkin*, 228 N.E.2d 224, 226, 84 Ill. App. 2d 467 (Ill. App. Ct. 1967) (evidence that bartender steered patron to prostitute justified revocation).

An Illinois importing distributor must be licensed as a distributor. 235 Ill. Comp. Stat. 5/5-1(c). An importing distributor must hold received alcohol in his warehouse from receipt until delivery to a retailer. 235 Ill. Comp. Stat. 5/6-8. A tax measured by volume is imposed on importing distributors and must be paid within 15 days of the month following delivery to a retailer. 235 Ill. Comp. Stat. 5/8-1; 235 Ill. Comp. Stat. 5/8-2. A distributor may only deliver to a licensed retailer. 235 Ill. Comp. Stat. 5/1-1(b).

Common carriers delivering alcohol into Illinois are required to file shipment manifests with the Illinois Liquor Control Commission. 235 Ill. Comp. Stat. 5/8-12. Consequently, reconciliation of the manifest information with the distributor tax filing and the warehouse inventory creates a fail-safe system for tax collection. If manifested product is

not in the inventory, it has been delivered and tax is due. 235 Ill. Comp. Stat. 5/8-2. Further, the tax document verifies that the distributor is only selling to retailers, not consumers, because the retailer must remit the sales tax to the state, accounting for the product. 235 Ill. Comp. Stat. 5/8-14. This distribution system means that sales to consumers go through licensed retailers and, as set forth above, Illinois polices retailers by inventory control to assure that taxes are paid and that sales are not made to minors or in furtherance of undesirable conduct.

Illinois permits some limited direct shipment to Illinois consumers, 235 Ill. Comp. Stat. 5/6-29, while maintaining a general prohibition. 235 Ill. Comp. Stat. 5/6-29.1. Retail inventory control is a regulatory scheme which serves to limit youth access.

IV. This Case Will Have A Substantial Impact On The Ability Of Illinois And Other States To Maintain Control Of Imported Alcohol

This Court now has before it decisions by the Second Circuit and the Sixth Circuit Courts of Appeals that take radically different views of the authority to regulate the importation of intoxicating liquor granted to the states by the Twenty-First Amendment and of the interplay between the Twenty-First Amendment and the dormant Commerce Clause. The very basis of their analyses differs.

The Second Circuit essentially looks at the scope of authority granted by the Twenty-First Amendment and allows states to regulate the importation of liquor in any rational fashion within that scope.

The Sixth Circuit, however, employs a two-step approach, starting with a dormant Commerce Clause analysis

and, if the state statute fails to pass a "strict scrutiny" test, proceeding on to determine whether the statute is somehow "saved" by the Twenty-First Amendment.

The Sixth Circuit approach effectively reduces the Twenty-First Amendment to surplusage and prevents a state from regulating alcohol in a fashion any stricter than it may regulate other goods in interstate commerce.

Consider:

- An out of state Internet seller with no physical presence in Illinois sells directly to an Illinois liquor retailer. Under the current law requiring physical presence to establish Commerce Clause nexus with a taxing state, the State of Illinois has no ability to impose a sales or use tax on the seller. *See Quill Corporation v. North Dakota*, 504 U.S. 298, 112 S. Ct. 1904 (1992); *National Bellas-Hess, Inc. v. Department of Revenue*, 386 U.S. 753, 87 S. Ct. 1389 (1967). The state loses not only revenue, but the ability to use high taxes to depress consumption. Furthermore, the state must deploy more resources or divert existing resources to ensure that only licensees are selling, and selling within the limits of the law.
- Under Illinois law, a distributor must operate a strictly controlled warehouse. The inventory can be ascertained by the deliveries made and reported from the common carrier delivery manifests. The distributor pays a tax when product at the warehouse is delivered to a licensed retailer. However, if an Illinois distributor were to purchase product over the Internet and have it delivered directly to the retailer, tracking, regulating and taxing the product would become infinitely more difficult for the State. An untraceable, unidentified supply of liquor will

encourage failure to pay tax and lower prices, making liquor more accessible to minors.

According to a July 2004 report released by the National Governor's Association and the National Conference of State Legislators, sales over the Internet topped $104 billion in 2003, a nearly 40% jump over the previous year. *See* Forrester Research, Inc., *The Growth Of Multichannel Retailing*. The volume of sales over the Internet has grown exponentially in the years since this Court last interpreted the Twenty-First Amendment. There is no reason to think that growth will not continue.

This is undoubtedly true with respect to alcohol sales to minors, as well. A 2000 poll by Americans for Responsible Alcohol Awareness found 80% of college students say their peers are likely to purchase alcohol over the Internet, as no age verification is required. *National Survey: 80% of College Students Say Peers Likely to Purchase Alcohol Online* (April 4, 2000) *at* http://www.texassafetynetwork.org/news/reporter/eightypercent. Volume alone will render it increasingly hard for state's to prevent and police such sales.

V. The *Swedenburg* Analysis Facilitates State Efforts To Control Improper Alcohol Use

The Second Circuit's approach in *Swedenburg* requires state liquor control schemes to be rational exercises of power pursuant to the purpose of the Twenty-First Amendment. It necessarily looks to a state's regulatory structure to find meaning for any particular component subject to challenge.

The Sixth Circuit's logic in *Granholm* starts by treating liquor the same as if it were any other commodity,

like autos, milk, or furniture. If it finds discriminatory treatment of out-of-state-sourced liquor, it defaults to Commerce Clause strict scrutiny.

The Sixth Circuit approach is inconsistent with the language of the Twenty-First Amendment prohibiting importation in violation of the state's laws and ignores the overwhelming medical and economic evidence that liquor is the dangerous drug most affecting American society. Furthermore, it flies in the face of the explosive development of a new distribution technology that threatens to swamp efforts at liquor regulation, the Internet.

Illinois predicates its liquor tax collection system on distributor collection and payment. The Internet can go around it. Under the Sixth Circuit approach, perhaps Illinois could find a way to collect the tax from out-of-state sources. But it would succeed only if *Quill* does not apply, if Congress permits, if presence is not required, and if the Internet shipper can actually be found. It makes a high tax/lower consumption strategy for liquor control virtually a dead letter.

Collection from in-state sources will be more difficult if not impossible. A state cannot police its sales tax collections if Internet delivery to retailers becomes physically possible. The suggestion that the state do more physical audits comparing inventory to sales tax remissions and distributor delivery reports is unrealistic. Illinois has 25,000 retail liquor licensees. Constant physical surveillance of retail sites is not a feasible enforcement option. Physical surveillance of cyberspace is virtually impossible.

If a state predicates underage distribution control on retail carding to determine eligibility, it still may be able to impact diversion to minors if direct shippers are physically

present in the state because the state has much more intimate supervision of how the shippers conduct business. Internet sites can open and close in a click.

Currently, the circuits are split on direct sales of liquor. An Internet industry in liquor looms. Illinois, like other states, has a system that uses inventory controls to tax and monitor retail sales. Undermining the tools of control will not help. Imposing Commerce Clause strict scrutiny for a test of Twenty-First Amendment rational purpose will promote uncontrolled, unregulated liquor sales. If states can effectively regulate the development of this industry, the political branches of government may devise a strategy for dealing with this dangerous product.

CONCLUSION

The judgment of the Second Circuit Court of Appeals in *Swedenburg v. Kelly*, 358 F.3d 223 (2d Cir. 2004) should be affirmed and the judgment of the Sixth Circuit Court of Appeals in *Heald v. Engler*, 342 F.3d 517 (6th Cir. 2003) reversed.

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Respectfully submitted,

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Supreme Court of the United States

JENNIFER M. GRANHOLM, Governor, *et al.*,

Petitioners,

v.

ELEANOR HEALD, *et al.*,

Respondents.

MICHIGAN BEER AND
WINE WHOLESALERS ASSOCIATION,

Petitioner,

v.

ELEANOR HEALD, *et al.*,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF MEMBERS OF THE UNITED STATES CONGRESS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE CONGRESSIONAL *AMICI CURIAE*[1]

The Congressional *amici* are a bipartisan group of Senators and Representatives with an interest in the outcome of this case and its effect on the implementation and interpretation of the Twenty-first Amendment Enforcement Act. The Congressional *amici* have a strong interest in the Court's continuing interpretation of the Commerce Clause to prohibit state laws that discriminate against out-of-state commerce, and they oppose state laws that economically discriminate or whose purpose is economic protectionism for in-state businesses.

The Twenty-first Amendment Enforcement Act of 2000, 27 U.S.C. § 122a, gives state attorneys general the power to seek injunctive relief in federal courts against violators of state laws regulating the importation and transportation of intoxicating liquor. Subsection (e) of the Act, "Rules of Construction," guides the federal courts on the jurisdictional question and looks to this Court for interpretation. It provides that federal jurisdiction should be construed to extend only to a "State law that is a valid exercise of power vested in the States ... under the twenty-first article of amendment to the Constitution of the United States as such article of amendment is interpreted by the Supreme Court of the United States including interpretations in conjunction with other provisions of the Constitution of the United States."

Congressional debate on the "Rules of Construction" provision focused on Supreme Court decisions interpreting the purpose and effect of the Twenty-first Amendment in light of the Commerce Clause. Specifically mentioned with

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[1] A list of the individual members of Congressional *amici* is included in the Appendix. Pursuant to Sup. Ct. R. 37.6, the Congressional *amici* affirm that this brief has been prepared solely by counsel for the *amici*. The Coalition for Free Trade and Family Winemakers of California made monetary contributions for the preparation and submission of this brief. Letters from all parties consenting to the filing of this brief have been filed with the Clerk.

approval during debate were *Bacchus Imports, Ltd. v. Dias* and other cases holding that the Twenty-first Amendment did not repeal the Commerce Clause as it applies to intoxicating liquor, and that the Twenty-first Amendment, therefore, must be considered in the context of Congress' power to regulate interstate commerce.[2] The cases now before the Court will define the relationship between the Commerce Clause and the Twenty-first Amendment and the scope of the laws to restrict the importation of intoxicating liquor states can enforce pursuant to the Twenty-first Amendment Enforcement Act.

SUMMARY OF ARGUMENT

The Court's decisions establish that, in exercising authority to regulate the importation of alcohol for use and distribution within its borders, a state may not discriminate against or burden interstate commerce unless it can show that the discriminatory aspects of its laws and regulations advance one of the core concerns of the Twenty-first Amendment and there is no reasonable, nondiscriminatory alternative. Michigan cannot meet either burden.

Petitioners and *amici* advance several arguments in their challenge to the precedent and constitutional jurisprudence that support the Sixth Circuit's discussion in *Heald v. Engler*.[3] They contend that, in enacting the Wilson and Webb-Kenyon Acts, Congress delegated to the states the authority to regulate the importation and transportation of alcohol in any way they saw fit, including discriminating against interstate shipments. But the plain language and legislative histories of the Wilson Act, the Webb-Kenyon Act, and the Twenty-first Amendment

[2] *Healy v. Beer Inst.*, 491 U.S. 324 (1989); *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573 (1986); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984); *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964).

[3] 342 F.3d 517 (6th Cir. 2003).

Enforcement Act make clear that Congress did not do so. The Wilson Act of 1890, by its express terms, does the opposite of authorizing discrimination against interstate commerce. It reversed the "Original Package Doctrine," subscribes to uniformity of treatment, and authorizes states to exercise their police powers to restrict the importation of alcoholic beverages "to the same extent *and in the same manner* as though such liquids or liquors had been produced in such state or territory." *Id.* (emphasis added).

The Webb-Kenyon Act of 1913 continued Congress' objective of authorizing states to regulate in-state and out-of-state products evenhandedly. By passing the Twenty-first Amendment, Congress did not seek to depart from the uniformity between in-state and out-of-state interests that it had mandated in the earlier statutes; section 2 of the Twenty-first Amendment enshrined that nondiscriminatory intent in the Constitution.

The Twenty-first Amendment Enforcement Act of 2000, which most of the Congressional *amici* signing this brief voted for, authorizes state attorneys general to seek injunctions in federal court to enforce state anti-liquor laws. But Congress set limits; federal jurisdiction is available *only* if the laws are valid exercises of power under the Twenty-first Amendment as "interpreted by" this Court, "including interpretations in conjunction with other provisions of the Constitution." The Act's directive that it not "be construed to grant to States any additional power" is a powerful reaffirmation that Congress has not delegated authority to the states to discriminate against out-of-state shipments of wine.

Some *amici* seek to deflect the focus of the argument to the dangers of youth access to alcohol in general, rather than the precedent and constitutional jurisprudence that should govern this case. In *44 Liquormart, Inc. v. Rhode Island*, *Reno v. ACLU*, and other cases, the laudable goal of protecting youth collided with other constitutional provisions. This Court's approach in First Amendment and Commerce Clause cases has been to protect the constitutional value, whether it be commercial speech or interstate

commerce, by placing the burden of proof on the proponent of the statutory restriction. The proponent must demonstrate that the measures are necessary to achieve the legitimate goals and that there is no less discriminatory or restrictive alternative that achieves the statute's goals. Michigan's law fails both tests.

First, the discriminatory aspects of Michigan's provisions violate the Commerce Clause by permitting in-state wineries to make direct shipments to consumers, while barring out-of-state wineries from doing so, or making it more burdensome for them to do so. In-state wineries are permitted to ship their products directly to consumers, but Michigan requires out-of-state wineries to ship to licensed wholesalers, and it bans their direct shipments to Michigan consumers. Out-of-state wineries must pay twelve times more ($300) for a license to sell to a Michigan wholesaler than in-state wineries. The discriminatory Michigan statutes and regulations do not square with its valid interest in protecting youth against consumption of alcoholic beverages.

Second, there are ample nondiscriminatory means to achieve Michigan's goals. A 2003 Federal Trade Commission report found that any marginal advancement in youth protection or other core Twenty-first Amendment concerns achieved by a discriminatory ban could be achieved in a less discriminatory manner. The FTC identified more than twenty states that permit interstate direct wine shipping and found that many have adopted nondiscriminatory alternatives for regulating direct shipping by out-of-state wineries. According to the Report, states "experience[ ] few, if any, problems with interstate direct shipment of wine to minors."[4] Those less restrictive alternatives include: (1) permit or license requirements for out-of-state shippers, including mandatory remittance of taxes; (2) labeling and delivery requirements that ensure that wine is delivered only to adults; (3) enforcement mechanisms,

[4] Federal Trade Commission Report entitled "Possible Anticompetitive Barriers to E-Commerce: Wine" (2003) ("FTC Report") at 4.

including stiff penalties for violations of state direct shipment laws; (4) state cooperatives for interstate use tax collection; and (5) use tax reporting requirements on state income tax forms.

The undersigned Members of Congress share the view that neither the Twenty-first Amendment nor any other federal legislation gives the states authority to discriminate against out-of-state alcohol for the purpose of economic protectionism.

ARGUMENT

I. The Sixth Circuit's Decision Is Consistent With Precedent Striking a Balance Between the Dormant Commerce Clause and the Twenty-first Amendment.

In exercising authority to regulate the importation of alcohol for use and distribution within its borders, a state may not discriminate against or burden interstate commerce unless it can show that the discriminatory aspects of its laws and regulations advance one of the core concerns of the Twenty-first Amendment and there is no reasonable, nondiscriminatory alternative. The Sixth Circuit correctly determined, under a traditional dormant Commerce Clause analysis, that Michigan's laws unconstitutionally discriminate against out-of-state wine shippers.

A. Traditional Dormant Commerce Clause Strict Scrutiny Applies to State Exercises of Power Under the Twenty-first Amendment.

Under *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 578-79 (1986),[5] a state statute that directly regulates or discriminates against interstate commerce, or has the effect of favoring in-state

[5] Citing *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *Shafer v. Farmers Grain Co.*, 268 U.S. 189 (1925); and *Edgar v. MITE Corp.*, 457 U.S. 624 (1982) (plurality opinion).

economic interests over out-of-state interests violates the Commerce Clause. A discriminatory statute may stand but only if the state can demonstrate that the discrimination advances a legitimate local purpose that cannot be served by a reasonable, nondiscriminatory alternative. *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988). The proponent state must demonstrate, however, that the discriminatory aspects of the statute specifically advance that legitimate local purpose. *See id.* at 279-80. States have substantial latitude to regulate commerce within their respective borders so as to promote the health and safety of their citizens, but their efforts remain subject to the dormant Commerce Clause:

> [A] finding that state legislation furthers matters of legitimate local concern, even in the health and consumer protection areas, does not end the inquiry. Such a view . . . "would mean that the Commerce Clause of itself imposes no limitations on state action . . . save for the rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate goods."

Hunt v. Washington State Apple Adver. Comm'n, 432 U.S. 333, 350 (1977) (quoting *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951)).[6]

Traditional dormant Commerce Clause strict scrutiny is appropriate for state statutes and regulations that discriminate against out-of-state wine shippers. Where, as here, laws facially discriminate and a state is unable to establish that its asserted goal could not be achieved in a nondiscriminatory manner, its invalidity is conclusively established, "despite the fact that the law regulates the sale of alcoholic beverages, since its discriminatory character eliminates the immunity afforded by the Twenty-first Amendment." *Healy v. Beer Inst.*, 491 U.S. 324, 344 (1989)

[6] *See also City of Philadelphia*, 437 U.S. at 626-27; *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 957 (1982); *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979).

(Scalia, J., concurring). In the context of the Twenty-first Amendment, a statute that is determined to be discriminatory in purpose or effect may be a permissible exercise of state authority only if the interests implicated by the state regulation are closely related to one of the core values of the Twenty-first Amendment – temperance, raising revenue, or orderly markets – and there is no reasonable nondiscriminatory alternative. *See Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 714 (1984); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 275 (1984). Michigan's laws do not meet either test.

B. Michigan's Laws Discriminate Against Out-of-State Wineries.

The Michigan laws economically discriminate in purpose and effect by differentiating between in-state and out-of-state wineries. Michigan maintains a three-tier distribution system for wine and beer, requiring that licensed manufacturers sell to licensed wholesalers, which then sell to licensed Michigan retailers. Retailers then sell the wine and beer to Michigan consumers. Michigan requires that out-of-state wineries that produce and bottle their own wine obtain an "outstate seller of wine license" to be able to deliver, ship, or transport their wine into Michigan. *See* Mich. Admin. Code r. 436.1705(2)(d) (2004) (governing "outstate seller of wine licenses"). However, the holder of an "outstate seller of wine license" may ship its product only to a licensed wholesaler in Michigan, with the only exception being on written order otherwise from the Michigan Liquor Control Commission. Mich. Admin. Code r. 436.1719(5) (2004). There is no procedure to obtain a written exception to the requirement that an out-of-state winery ship its product only to a licensed wholesaler. Brief of Petitioners Michigan State Officials ("Michigan Br.") at 8. In reality, then, an out-of-state winery never may ship its product directly to a Michigan consumer. *Id.* In contrast, Michigan wineries may bypass the three-tier system to sell their wine at retail and deliver it directly to Michigan consumers. *Id.* at 7, 8. To sell wine to a Michigan

wholesaler, an out-of-state winery must pay twelve times ($300) the amount that in-state wineries pay ($25) to be able to ship directly to consumers. *Heald v. Engler*, 342 F.3d 517, 521 (6th Cir. 2003).[7]

Acknowledging the differences between its treatment of in-state and out-of-state wineries, Michigan defends on the grounds that its "regulatory framework" as a whole "clearly serves valid regulatory purposes of 'promoting temperance,' 'controlling the distribution of liquor,' and 'raising revenue.'" Michigan Br. at 32. Michigan asserts that it has chosen to permit in-state wineries to bypass the three-tier system because Michigan can still collect taxes and assess meaningful sanctions for noncompliance with its alcohol and beverage control laws, Michigan Br. at 7, and that "[t]he point of Michigan's system is that it addresses Michigan's need to protect its citizens by preventing the sale of alcohol to minors while promoting responsible drinking and to ensure the collection of taxes." *Id.* at 33. These generalized explanations, however, fail to provide any evidence that the *discriminatory aspects* of Michigan's regulatory system – *i.e.*, permitting in-state wineries to ship directly, but effectively prohibiting out-of-state

[7] The Sixth Circuit correctly held that all of these differentials combined to benefit in-state wineries and burden out-of-state wineries and noted that:

> Michigan wineries enjoy both greater access to consumers who wish to have wine delivered to their homes, and greater profit through their exemption from the three-tier system. Out-of-state wineries, on the other hand, must participate in the costly three-tier system, to their economic detriment and, although this is not clear from the record, may be shut out of the Michigan market altogether if unable to obtain a wholesaler.

Heald, 342 F.3d at 525. In contrast, the Second Circuit erred in *Swedenburg v. Kelly*, 358 F.2d 223 (2d Cir. 2004), also before this Court for review in No. 03-1274, when it ignored the acknowledged economic protectionist purpose and effect of New York's laws and held them to be constitutional. *See Swedenburg v. Kelly*, 232 F. Supp. 2d 135, 146 (S.D.N.Y. 2002) (New York's Attorney General acknowledged that economic protectionism was the purpose of the in-state farm winery exception to its ban on direct shipments of wine).

wineries to do so – themselves advance any of the core values of the Twenty-first Amendment.

Michigan's argument that it may still advance these core values of the Twenty-first Amendment, *notwithstanding* the benefits it accords to in-state wineries, misses the point. As *Bacchus*, *New Energy*, *Brown-Forman*, and Justice Scalia's concurrence in *Healy* make clear, the test is whether the discriminatory aspects of the statute advance those legitimate goals, not whether those goals may still be met without reference to the special treatment for in-state wineries. Also, despite Michigan's failure to demonstrate that the benefits it accords in-state wineries advance core concerns of the Twenty-first Amendment, Michigan has several nondiscriminatory alternatives available to it to achieve its legitimate regulatory goals. *See* Part IV *infra*.

II. The Arguments of Petitioners and Their *Amici* Are Contrary to Precedent and Congressional Action.

Petitioners and *amici* make several arguments to avoid the force of the Court's decisions. They argue that the discriminatory aspects of Michigan and New York's regulatory schemes constitute legitimate exercises of power under the Twenty-first Amendment.[8] They contend that the Twenty-first Amendment removed state alcohol regulation from the purview of the dormant Commerce Clause and Congress delegated its commerce authority to the states to regulate alcohol in any rational manner, therefore strict scrutiny does not apply to these statutes

[8] *See* Brief of Petitioner Michigan Beer & Wine Wholesalers Association ("Michigan Beer & Wine Wholesalers Br.") at 20-22, 24-34, Michigan Br. at 15-30, *Amicus Curiae* Brief of Ohio and 32 Other States ("Ohio Br.") at 12-17, and *Amicus Curiae* Brief of the National Alcohol Beverage Control Association and the National Conference of State Liquor Administrators ("NABCA Br.") at 10-12.

and regulations.[9] These arguments are contrary to the controlling decisions of this Court and Congressional action mandating otherwise.

A. Several Decisions By This Court Reject the Argument That the Twenty-first Amendment Repealed the Commerce Clause's Application to Wine.

The Twenty-first Amendment did not elevate the states' authority above the Commerce Clause or any other provision of the Constitution.[10] *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964), rejected as an "absurd oversimplification" the notion that the Twenty-first Amendment had "somehow operated to 'repeal' the Commerce Clause wherever regulation of intoxicating liquor is concerned" and observed that "[b]oth the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case." 377 U.S. at 331-32.[11]

[9] *See* Michigan Beer & Wine Wholesalers Br. at 18-20, Michigan Br. at 36-38, Ohio Br. at 17-18, NABCA Br. at 12-14, Brief of *Amicus Curiae* the Wine and Spirits Wholesalers of America, *et al.* ("Wine and Spirits Wholesalers Br.") at 20-21, and Brief of *Amicus Curiae* National Beer Wholesalers Association ("NBWA Br.") at 6-7.

[10] *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996); *Healy v. Beer Inst.*, 491 U.S. 324 (1989); *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573 (1986); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971); *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964).

[11] As petitioners and *amici* concede, laws passed in an exercise of Twenty-first Amendment powers remain subject to other constitutional provisions, such as the Export-Import Clause, the First Amendment, the Equal Protection Clause, and the Due Process Clause. *See, e.g., Dep't of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964) (Export-Import Clause); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S.

(Continued on following page)

Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984), affirms that laws passed in an exercise of Twenty-first Amendment powers remain subject to the dormant Commerce Clause. The *Bacchus* majority observed that

> [d]oubts about the scope of the Amendment's authorization notwithstanding, one thing is certain: The central purpose of the provision was not to empower States to favor local liquor industries by erecting barriers to competition. . . . State laws that constitute mere economic protectionism are therefore not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor.

Id. at 276. Likewise, a unanimous Court in *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 712 (1984),[12] relied upon years of precedent in holding that the Twenty-first Amendment "does not license states to ignore their obligations under other provisions of the Constitution."

Together, these decisions reject the notion that the Twenty-first Amendment removed state regulation of alcohol from the purview of the dormant Commerce Clause.

B. Congress Has Not Delegated to the States Its Commerce Clause Authority Over Interstate Shipment of Wine.

Congress has not delegated authority to the states to discriminate economically in the field of alcohol regulation. On the several occasions it has enacted legislation regarding state regulation of intoxicating beverages, Congress has done the opposite of authorizing state discrimination. In the early laws, Congress rectified an

484 (1996) (First Amendment); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971) (Equal Protection Clause).

[12] Citing *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 122 n.5 (1982); *California v. LaRue*, 409 U.S. 109, 115 (1972); *Constantineau*, 400 U.S. at 436; and *James B. Beam Distilling Co.*, 377 U.S. at 345-46.

imbalance that left interstate shipments freer from state regulation than intrastate shipments. The foundation of this legislation was uniformity. Congressional concern with uniform treatment of in-state and out-of-state alcoholic beverages continues to the preseht day.

i. The Wilson Act Explicitly Requires Uniform Application of State Laws.

In 1890, Congress enacted the Wilson Act,[13] to address the peculiar disparity between treatment of domestic and interstate alcohol that had grown out of court decisions. During the nineteenth century, states could exercise their local police power to regulate alcoholic beverages within their borders and to prohibit the in-state manufacture and sale of alcohol, but could not use that power to discriminate in favor of in-state products. *See License Cases*, 46 U.S. (5 How.) 504 (1847); *Walling v. Michigan*, 116 U.S. 446, 454 (1886). At the same time, however, states were prevented from prohibiting shipments from outside the state that were resold within the state in their original packages (the "Original Package Doctrine"). *See Bowman v. Chicago & N.W. Ry.*, 125 U.S. 465 (1888); *Leisy v. Hardin*, 135 U.S. 100 (1890). These decisions had the anomalous effect of discriminating in favor of out-of-state alcohol sellers because states could forbid domestic production of alcohol but could not stop alcohol imports. In response, Congress enacted the Wilson Act to empower the states to impose the same regulation on imported alcohol as domestic alcohol.

The Wilson Act insists on uniformity of treatment for in-state and out-of-state liquor shipments:

> [a]ll . . . intoxicating liquors transported into any state or territory, . . . shall upon arrival in such state or territory, be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers, *to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory*, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.

27 U.S.C. § 121 (emphasis added). In upholding the constitutionality of the Wilson Act, the Court held that its purpose was to resolve the conflict created by the Original Package Doctrine between the immunity accorded interstate goods under the dormant Commerce Clause and the states' police power:

> [s]o long, however, as state legislation continues to recognize wines, beer, and spirituous liquors as articles of lawful consumption and commerce, so long must continue the duty of the federal courts to afford to such use and commerce the *same measure of protection, under the constitution and laws of the United States, as is given to other articles.*

Scott v. Donald, 165 U.S. 58, 91 (1897) (emphasis added). *Scott* underscored that the Wilson Act was to be nondiscriminatory; it "was not intended to confer upon any state the power to discriminate injuriously against the products of other states in articles whose manufacture and use are not forbidden, and which are, therefore, the subjects of legitimate commerce." *Id.* at 100.[14]

ii. The Webb-Kenyon Act Did Not Delegate Authority to the States to Discriminate Economically.

The same nondiscrimination principles are preserved in the Webb-Kenyon Act.[15] The Webb-Kenyon Act was

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[13] Act of Aug. 8, 1890, ch. 728, 26 Stat. 313 (codified at 27 U.S.C. § 121).

[14] The Wilson Act remains in effect, and this Court has never questioned the continuing validity of *Scott*.

[15] First enacted in 1913, Act of Mar. 1, 1913, c. 90, § 1, 37 Stat. 699 (codified as 27 U.S.C. § 122) and re-enacted without change again in 1935, Act of Aug. 27, 1935, c. 740, § 202(b), 49 Stat. 877.

enacted to close a loophole forcing dry states to allow the importation of alcohol shipped interstate. In the wake of the Wilson Act, the Supreme Court had held a state's power to prevent the sale of alcohol in its original package in violation of its laws did not attach until receipt and delivery to the consignee of the alcohol shipped from another state. *Rhodes v. Iowa*, 170 U.S. 412, 426 (1898). To remedy the problem faced by the dry states, Congress once more reacted, this time with the Webb-Kenyon Act. It was "enacted simply to extend that which was done by the Wilson Act; that is to say, its purpose was to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in states contrary to their laws. . . . " *James Clark Distilling Co. v. W. Md. Ry.*, 242 U.S. 311, 323-24 (1917). Senator Sanders spoke to the gap left by the Wilson Act and the purpose of the Webb-Kenyon Act:

> As it is a State can protect its citizens against one another, but not against outsiders. A State can regulate the quality of liquor sold within the State, but it can not regulate the quality of liquor sold from outside the State. . . . There is here an invasion of State rights and a helplessness of States to protect themselves. They must therefore look to the National Government for relief. That is the object of this bill.

49 Cong. Rec. 700 (1912).

In passing the Webb-Kenyon Act, therefore, Congress sought only to assist the states in exercising their local police power to ensure compliance with state laws proscribing the sale of liquor, by permitting that power to attach to items shipped interstate before receipt by and delivery to the end-user. There is no indication that Congress intended to allow states to discriminate economically against interstate alcohol. To the contrary, the Webb-Kenyon Act, like its predecessor the Wilson Act, was intended to maintain regulatory parity for alcoholic beverages produced within the state and outside the state.

The Webb-Kenyon Act was enacted against the backdrop of the nondiscrimination principles highlighted in the text of the Wilson Act and the Court's decisions in *Scott v. Donald*, 165 U.S. 58 (1897), *License Cases*, 46 U.S. (5 How.) 504 (1847), *Mugler v. Kansas*, 123 U.S. 623 (1887), and *Walling v. Michigan*, 116 U.S. 446, 454 (1886). All established that under their police power, states could regulate the local manufacture and sale of alcohol, but could not use that power to discriminate in favor of in-state products. As Senator Williams explained during debate over passage of the Webb-Kenyon Act,

> Congress has just as much power to prescribe that the termination of an interstate transaction shall be at the State line as it has to prescribe that it shall cease at the consignee's door. The only reason the Supreme Court ever held otherwise was because Congress had not passed any act regulating interstate commerce upon this subject in such a way as to give the courts the right so to decide. . . . I think wherever Congress in the exercise of its power to regulate interstate commerce can exercise the power so as to be aidful and helpful to the States in the exercise of their police powers, that it ought to do so, and wherever possible not exercise it so as to restrict and restrain the States in the exercise of their police powers.

49 Cong. Rec. 4298 (1913). These principles were confirmed in *McCormick & Co. v. Brown*, 286 U.S. 131, 141 (1932), which held that "there is no reason for denying to the Webb-Kenyon Act its intended application to prevent the immunity of transactions in interstate commerce from being used to impede the enforcement of the states' valid prohibitions" enacted pursuant to the states' police powers reserved to them under the Tenth Amendment.

Despite the clear purpose of the Webb-Kenyon Act, petitioners and *amici* suggest that, in enacting it, Congress intended to remove state regulation of alcohol

from the purview of the dormant Commerce Clause.[16] But "for a state regulation to be removed from the reach of the dormant Commerce Clause, congressional intent must be *unmistakably clear*." *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 91 (1984) (emphasis added). The debates surrounding the Webb-Kenyon Act, certainly do not evidence such "unmistakably clear" intent to delegate. To the contrary, the debates suggest that state regulation was not removed from the reach of the dormant Commerce Clause. Senator McCumber emphasized the absence of any such delegation:

> If the act is made clear that we do not put into effect a State law when the commodities arrive in such State or *do not delegate our authority in any manner to the State*, but simply provide a condition under which the commodity may lose its commercial [immunity] character, and thereby become subject to the laws of the State, the second section may be so framed as to be held constitutional.

49 Cong. Rec. 702 (1912) (emphasis added).[17] Such an understanding did not change over time. *See* 76 Cong. Rec. 4140 (1933) (Statements of Senators Wagner and Blaine in debating passage of the Twenty-first Amendment that, in

[16] *See* Michigan Beer & Wine Wholesalers Br. at 19-20, Michigan Br. at 36-38, Ohio Br. at 17-18, NABCA Br. at 12-14, Wine and Spirits Wholesalers Br. at 20-21, and NBWA Br. at 6-7.

[17] *See also* 49 Cong. Rec. 702 (1912) (Statement of Sen. McCumber that "imposing the condition that the goods shall be so subjected to the laws of a State is not in any sense whatever delegating authority to the State to control by its legislation interstate commerce"); *id.* at 704-05 (Statement of Sen. McCumber comparing the Webb-Kenyon Act with an act prohibiting interstate commerce in birds or animals killed in any state violation of that state's law and observing, "I hardly think anyone would contend that this prohibition is a delegation of authority to the State. It is simply a condition under which the shipment may or may not be made"); *id.* at 705 (Statement of Sen. McCumber: "[Congress] does not delegate its power to a State. It recognizes its own authority over the article as an article of interstate commerce and says it is no longer a subject of commerce, and being no longer a subject of commerce it falls of itself under the Laws of the State in which it is then located.").

enacting the Webb-Kenyon Act, Congress did not delegate to the States the power to regulate interstate commerce, but instead "Congress itself regulated interstate commerce to the point of removing all immunities of liquor in interstate commerce"). As Senator Kenyon, one of the Act's sponsors, stated, "its purpose, *and its only purpose*, is to remove the impediment existing as to the States in the exercise of their police powers regarding the traffic and control of intoxicating liquors within their borders." 49 Cong. Rec. 707 (1912) (emphasis added). Rather than expressing an "unmistakable intent" to remove state regulation of alcohol from the reach of the dormant Commerce Clause, then, Congress displayed its intent that state regulation continue to be subject to it.

iii. Nor Did Congress Delegate Commerce Power to the States in Section 2 of the Twenty-first Amendment.

Like the Wilson and the Webb-Kenyon Acts, the Twenty-first Amendment was passed to remove impediments to the states' nondiscriminatory exercise of their police power over all alcohol – this time by repealing Prohibition and the overreaching federal police power that attended it and assuring that dry states could enforce their valid police powers to prohibit interstate liquor in the same manner as in-state liquor. There is no evidence in the legislative history of the Twenty-first Amendment that Congress intended section 2 to permit the states to enforce economically discriminatory laws. Rather, the history points to the purpose of section 2 as being to assure dry states that they could constitutionally and effectively exercise their police powers by treating interstate liquor the same as in-state liquor. According to Senator Borah, a dry-state senator,

> the eighteenth amendment would never have been adopted had it not been for the open, brazen, corrupt, persistent defiance of the laws of the dry States by the liquor interests outside those States. At the time the eighteenth amendment was

adopted, 33 States had prohibition in some form. The people had declared they wanted to be rid of this evil, or at least to control it in their own way. These States were invaded, their laws broken, their officials corrupted, by the same influences which now plead for States rights and local control. They did not at that time respect that right at all. They trampled upon it and scoffed at it. Therefore, if we are to have what we are now promised, local self-government, States rights, the right of the people of the respective States to adopt and enjoy their own policies, we must have some other method, some other provisions of the Constitution, than those which existed prior to the adoption of the eighteenth amendment.

All this was sought to be remedied by the Webb-Kenyon Act, and I am very glad indeed the able Senator from Arkansas has seen fit to recognize the justice and fairness to the States of incorporating it permanently in the Constitution of the United States.

76 Cong. Rec. 4172 (1933).[18] Instead of granting to the states *carte blanche* to discriminate economically, section 2 of the Twenty-first Amendment enshrined the Webb-Kenyon Act in the Constitution, thereby assuring dry states that they could exercise their police powers to prohibit the sale of liquor within their borders.[19]

[18] *See* 76 Cong. Rec. 4141 (1933) (Statement of Sen. Blaine: "So, to assure the so-called dry States against the importation of intoxicating liquor into those States, it is proposed to write permanently into the Constitution a prohibition along that line . . . [T]he pending proposal will give the States that guarantee."). *See also* 76 Cong. Rec. 4168 (1933) (Statement of Sen. Fess: "In other words, the second section of the joint resolution that is now before us is designed to permit the Federal authority to assist the States that want to be dry to remain dry.").

[19] *See* 76 Cong. Rec. 4170 (1933) (Statement of Sen. Borah); 76 Cong. Rec. 4171 (1933) (Statement of Sen. Wagner); 76 Cong. Rec. 4172 (1933) (Statements of Senators Lewis and Borah), expressing the same sentiment.

This Congressional concern with effective uniform enforcement of state police power was highlighted in the debate surrounding a proposed, but ultimately rejected, section 3 of the Twenty-first Amendment.[20] The problem with proposed section 3 was that – because federal law is supreme – there could be no actual "concurrent" exercise of police power by the federal and state governments with regard to saloons. Therefore, the federal government could continue to interfere with wholly local police power in regulating local use and distribution of alcohol. As Senator Wagner put it, proposed section 3 would "not restore to the States responsibility for their local liquor problem. It does not withdraw the Federal Government from the field of local police regulation into which it has trespassed." 76 Cong. Rec. 4144 (1933).[21]

iv. The Twenty-first Amendment Enforcement Act Contemplates the Enforcement of Only Valid, Nondiscriminatory State Laws.

In 2000, Congress enacted the Twenty-first Amendment Enforcement Act.[22] It provides federal jurisdiction for state attorneys general seeking injunctive relief for violations of state alcohol laws regulating the importation and transportation of intoxicating liquor. 27 U.S.C. § 122a(c). That federal jurisdiction is available only for state laws that constitute valid exercises of power vested in the states under the Twenty-first Amendment, as "interpreted

[20] "Congress shall have concurrent power to regulate or prohibit the sale of intoxicating liquors to be drunk on the premises where sold." 76 Cong. Rec. 4141 (1933) (Statement of Sen. Blaine).

[21] Other Senators identified the same problem with proposed section 3. *See* 76 Cong. Rec. 4143 (1933) (Statement of Sen. Wagner); 76 Cong. Rec. 4145-48 (1933) (Statements of Sen. Wagner); 76 Cong. Rec. 4161 (1933) (Statement of Sen. Norris); 76 Cong. Rec. 4170-71 (1933) (Statement of Sen. Borah).

[22] 27 U.S.C. § 122a.

by the Supreme Court of the United States including interpretations in conjunction with other provisions of the Constitution of the United States." 27 U.S.C. § 122a(e)(1). The Twenty-first Amendment Enforcement Act "shall not be construed to grant to States any additional power." 27 U.S.C. § 122a(e)(2). In other words, federal jurisdiction is available only for those state laws that do not violate any other provision of the Constitution, including the dormant Commerce Clause.

The requirement that state laws be otherwise constitutional is manifest in the debates leading to enactment. Senator Feinstein, a member of the Senate Judiciary Committee, made clear that

> this provision is simply a jurisdictional statute with a very narrow and specific purpose. The bill is not intended to allow the enforcement of invalid or unconstitutional State liquor laws in the Federal courts, and is certainly not intended to allow States to unfairly discriminate against out-of-State sellers for the purposes of economic protectionism.

146 Cong. Rec. 10214 (2000). Senator Feinstein further expressed the view that the Twenty-first Amendment Enforcement Act is premised on those many Supreme Court cases holding that the Twenty-first Amendment "does not diminish the force of the supremacy clause, the establishment clause, the export-import clause, the equal protection clause, and, again, the commerce clause; nor does it abridge rights protected by the first amendment." *Id.* at 10215.[23] The amendment to the bill encompassing

[23] *See also* 146 Cong. Rec. 9046 (2000) (Statement of Rep. Radanovich that previous versions of the Twenty-first Amendment Enforcement Act would have permitted states to discriminate unfairly against out-of-state sellers for economic protectionist purposes, but "[s]uch protectionism would clearly be a violation of the Commerce clause of the Constitution; thus, the current version of this legislation does not allow for such protectionist acts"); 146 Cong. Rec. 9039 (2000) (Statement of Rep. Hyde, Chair of the House Judiciary Committee, affirming that the rules of construction language "is an implicit recognition of the

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this understanding was passed by a unanimous voice vote in the Senate committee and became subsection (e) of the enacted Twenty-first Enforcement Act. *Id.*

III. The Laudable Interest in Protecting Youth Does Not Nullify Application of the Commerce Clause to the Michigan Laws.

Ignoring decades of Court decisions, some *amici* attempt to divert the Court's attention toward the broad issue of youth access to alcohol rather than the questions of whether the Michigan laws materially advance the state's asserted legitimate goals and whether there are less restrictive alternatives available.[24] The decisions that *amici* ignore hold that a state's asserted interest in temperance does not trump constitutional provisions, including traditional Commerce Clause concerns, when less restrictive alternatives for accomplishing a state's asserted goal exist.

First Amendment jurisprudence provides a helpful framework within which to evaluate the many problems with *amici's* approach. First Amendment precedent has long required that states, in exercising their power to limit youth access to harmful materials, narrowly tailor their restrictions so that free speech is burdened in only the most limited ways. *See 44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484, 507 (1996); *see also Lorillard Tobacco*

Supreme Court decisions made over the last 35 years holding that the 21st [sic] Amendment cannot be read in isolation from other provisions contained in the U.S. Constitution"); 145 Cong. Rec. 6871 (1999) (Statement of Rep. Conyers: "neither this act nor Webb-Kenyon are in anyway designed to supersede any other provision of the Constitution, such as the first amendment or the Commerce clause (including the so-called 'dormant' Commerce clause). In this regard, the amendment reaffirms the Supreme Court's 1984 decision in *Bacchus Imports* [sic] *v. Dias,* 468 U.S. 263 (1984), which held that a state law which imposed an excise tax on sales of liquor but exempted certain locally produced alcoholic beverages violated the Commerce clause.").

[24] *See* Ohio Br. at 22-24 and *Amicus Curiae* Brief of Michigan Association of Secondary School Principals, *et al.* ("MASSP Br.") at 5-22.

Co. v. Reilly, 533 U.S. 525, 563 (2001). A state's asserted interest in promoting temperance under the Twenty-first Amendment clashed with the First Amendment in *44 Liquormart*. There, this Court reviewed Rhode Island statutes prohibiting the advertising of alcoholic beverage prices. As in *Heald*, Rhode Island's asserted interest was to promote temperance. *Id.* at 504. *44 Liquormart* held that the statutes unconstitutionally restricted protected speech for two reasons.

First, the state failed to demonstrate that its regulations would advance the state's interest and, second, the state failed to show that the statutes were narrowly tailored. *Id.* at 505-07. Rhode Island's expressed interest in protecting youth was not the end of the analysis. Rather, if a state regulation merely mitigated the harm the state sought to remedy, the regulation would not pass muster. *See id.* at 505. Specifically, "a commercial speech regulation 'may not be sustained if it provides only ineffective or remote support for the government's purpose.'" *Id.* (quoting *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 564 (1980)). A state, therefore, has the burden of showing not only that its direct-shipment restrictions will advance temperance, but that they will do so "to a material degree." *See Edenfield v. Fane*, 507 U.S. 761, 771 (1993).

The balancing articulated by *44 Liquormart* is not a constitutional anomaly. A number of other First Amendment cases hold that speech considered harmful when directed toward children may not be curtailed if, on balance, the regulation unduly burdens speech that adults may legally receive. *See Reno v. ACLU*, 521 U.S. 844, 875 (1997). *See also Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 252 (2002) ("The precedents establish . . . that speech within the rights of adults to hear may not be silenced completely in an attempt to shield children from it.").

Reno v. ACLU struck down the Communications Decency Act ("CDA"), holding that the statute did not offer the least restrictive means of achieving the government's goals. 521 U.S. at 876-79. While recognizing that the government's interest in safeguarding the well-being of children was compelling and justified, *id.* at 869-70, this Court nonetheless declared the content-based regulation to be unconstitutional because it was not narrowly tailored to further that interest. *Id.* at 879. The Court recited strict scrutiny's "least restrictive means" test: "[The] burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve." *Id.* at 874. The Court invalidated the CDA because it did not employ devices that would restrict youth access, while at the same time permit adults to receive non-obscene speech. *Id.* at 876-79.

Likewise, a state law or regulation complies with the dormant Commerce Clause if it materially advances an asserted state interest, and does so through the least restrictive means. *See New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988); *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 957 (1982); *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979); *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 353 (1977); *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951). The test of the constitutionality of the Michigan statute under the dormant Commerce Clause should parallel the analysis in *44 Liquormart*. As a threshold matter, because the direct shipment scheme burdens only out-of-state interests, leaving in-state shipments virtually unobstructed, the benefits achieved through the legislation are doubtful. The risk that minors will have greater access to alcohol via direct shipment is not alleviated by placing disparate burdens on out-of-state producers while allowing for direct-shipment of in-state wine.

To the extent that concern about youth access is advanced as a reason to prevent out-of-state wineries from shipping their products, Michigan ignores that its regulations prevent adults from obtaining certain wines that may be available to them only through direct shipment from the winery. To paraphrase, the kind of beverages available to adults cannot be limited to that which would be suitable for the school cafeteria. *See Reno*, 521 U.S. at 874. On the other hand, the argument that Michigan's regulations prohibiting

out-of-state wineries from shipping wine to consumers advance the goal of preventing minors from obtaining alcohol through direct shipments does not withstand scrutiny because the same regulations expressly permit in-state wineries to bypass the three-tier system and ship their products directly to Michigan consumers.

Just as the mere possibility of mitigating alcohol abuse was not enough to save the Rhode Island regulation in *44 Liquormart*, that the Michigan law might mitigate youth exposure to wine, while affecting adult consumption of wine, is insufficient. Michigan's ban of direct sales to consumers by out-of-state wineries cannot pass constitutional muster under the Commerce Clause. The burden on adult speech is unacceptable when less restrictive alternatives would be effective in advancing the state's legitimate purpose. For the same reasons, the burden on interstate commerce is unacceptable when nondiscriminatory alternatives are available to Michigan to achieve its core goals of limiting youth access and promoting temperance. *See* Part IV, *infra*.

IV. A 2003 FTC Report on Direct Shipment of Wine Lists Many Nondiscriminatory Alternatives to Advance the States' Core Concerns.

Petitioners and *amici* argue that a ban on, or restrictions for, direct shipments by out-of-state wineries are the only manner in which a state can ensure that wine is not illegally shipped to minors or that taxes are not avoided. But a July 2003 FTC Report entitled "Possible Anticompetitive Barriers to E-Commerce: Wine"[25] ("FTC Report") identifies numerous reasonable nondiscriminatory alternatives that other states have implemented: (1) permit or license requirements for out-of-state shippers, including mandatory remittance of taxes; (2) labeling and delivery requirements that ensure wine is delivered only to adults; (3) state cooperatives for interstate use tax collection; (4) use tax reporting requirements on state income tax forms; and (5) enforcement mechanisms, including stiff requirements for non-compliance.

Permits. According to the FTC Report, several states that allow interstate direct shipments require out-of-state shippers to obtain a permit or license to ship wine directly to consumers.[26] FTC Report at 27. States often require that such license holders remit taxes on their shipments, comply with state regulations regarding labeling and delivery of shipments, and pay a license fee. *Id.* at 28-29. States can also require that a winery submit to the state's jurisdiction and comply with its alcohol shipment laws as conditions for receiving a license.[27] *Id.* at 27. New Hampshire, for example, allows any winery currently licensed in

[25] The FTC Report was signed by all five of the FTC's Commissioners and its major bureaus. FTC Report at i. Additionally, on October 30, 2003, a hearing was held in the House, *E-Commerce: The Case of Online Wine Sales and Direct Shipments: Hearing Before the Subcommittee on Commerce, Trade, and Consumer Protection of the House Committee on Energy and Commerce*, 108th Cong. 2 (2003) ("October 30, 2003 Hearing"), which focused on the FTC Report. During the hearing, certain Representatives found the FTC Report's findings, conclusions, and recommendations persuasive. *See, e.g.*, October 30, 2003 Hearing at 3 (Statement of Rep. Stearns: "If the FTC staff report's analysis holds true for markets other than just McLean, Virginia, I find it persuasive that States should pursue less restrictive forms of regulation of direct interstate wine sales than outright bans."); *id.* at 6 (Statement of Rep. Radanovich: "The FTC Report that we will hear today discusses the various methods some States and shipping companies use to protect children. Notably, the report states that there are no documented non-sting cases of juvenile access to wine shipments generated from on-line sales. . . . Given this and other favorable aspects of the FTC Report, I believe Congress has the responsibility to allow consumers the choice to purchase wine on-line and give this venue a chance to grow and expand.").

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[26] *See, e.g.*, Neb. Rev. Stat. § 53-123.15(4) (2004); Nev. Rev. Stat. §§ 369.450, .490 (2003); N.H. Rev. Stat. Ann. § 178:27 (2003); N.C. Gen. Stat. § 18B-1001.1 (2004); N.D. Cent. Code § 5-01-16(5) (1987); S.C. Code Ann. § 61-4-747 (Law. Co-op. 2003); Va. Code Ann. § 4.1-112.1 (Michie 2003); Wyo. Stat. Ann. § 12-2-204 (2003).

[27] *See, e.g.*, S.C. Code Ann. § 61-4-747(C)(6) (Law. Co-op. 2003); Wyo. Stat. Ann. § 12-2-204(d)(vii) (2003).

its state of domicile to apply for an interstate direct shipping permit with the New Hampshire Liquor Commission. N.H. Rev. Stat. Ann. § 178:27(I)(a) (2003).[28] Wyoming and other states employ similar licensing schemes. Wyoming allows direct shipments of wine to consumers if the out-of-state winery agrees to remit a tax of twelve percent of the retail price of each shipment of wine; pay a license fee of fifty dollars; and ship no more than a total of eighteen liters of wine to any one household per year. Wyo. Stat. Ann. § 12-2-204 (2003). In South Carolina, a licensed out-of-state winery must pay a four-hundred-dollar fee every two years, remit all taxes due to the state at the same rate as if the sale were made in South Carolina, and agree not to ship more than twenty-four bottles of wine each month to one person. S.C. Code Ann. § 61-4-747 (Law. Co-op. 2003). To ship into Nebraska, an out-of-state winery must pay a fee of five hundred dollars, remit a gallonage tax if a tax on the wine has not already been paid, and ship no more than nine liters per year. Neb. Rev. Stat. §§ 53-124(11); 53-160; 53-194.03 (2004).

Labeling. States can also impose labeling and delivery requirements similar to those imposed in retail stores to ensure that wine is delivered only to a legal adult. FTC Report at 29. Some states require that wine be shipped in boxes that are clearly marked "Alcoholic Beverages, adult signature (over 21 years of age) required."[29] States also

[28] The out-of-state winery may ship up to sixty individual containers of not more than one liter of wine to any consumer per year. N.H. Rev. Stat. Ann. § 178:27(III). All direct shippers must pay a fee of 8 percent of the retail price of wine shipments to the state liquor commission and file with the commission a monthly tax report showing all shipments of alcohol into New Hampshire, with copies of invoices attached. N.H. Rev. Stat. Ann. § 178:27(V). The winery must keep these records on hand for three years to allow the state to perform an audit of the direct shipper's filings upon request. *Id.*

[29] *See, e.g.*, N.H. Rev. Stat. Ann. § 178:27(II) (2003); N.C. Gen. Stat. § 18B-1001.1(c) (2004); N.D. Cent. Code § 5-01-16(5) (1987); S.C. Code Ann. § 61-4-747(c)(2) (Law. Co-op. 2003); Va. Code Ann. § 4.1-112.1(C) (Michie 2003); Wyo. Stat. Ann. § 12-2-204(d)(iii) (2003).

require that wine be delivered by common carrier (*e.g.*, UPS and FedEx), and that carriers obtain the signature of a legal adult upon delivery and verify the age of the recipient by requesting appropriate identification.[30] These measures place a duty on both the shipper and the carrier to ensure that wine is not delivered to a minor.

That some states that prohibit interstate direct shipping allow intrastate direct shipping shows that these states are able to exercise sufficient regulatory control over direct shipping through the labeling and delivery requirements outlined above. While Michigan prohibits interstate direct shipping, it allows in-state wineries to ship directly to consumers, provided that (1) shippers affix to the package a label clearly stating that the package contains alcohol and that an adult signature and identification are required upon delivery; and (2) the person who delivers the package verifies that the recipient is of legal age and has the proper identification. Mich. Comp. Laws § 436.1203 (2004). If these measures are sufficient to prevent in-state wine from being delivered to minors, surely these same measures are sufficient to prevent out-of-state wine from being delivered to minors. *See* FTC Report at 28.

Taxes. With regard to revenue collection concerns, the FTC Report found that measures such as "requiring out-of-state suppliers to obtain permits and to collect and remit taxes" protected tax revenues in a less restrictive manner than a direct ban on out-of-state shipments. FTC Report at 38. There are even more nondiscriminatory measures through which states can achieve this goal. States can work together to ensure increased collection of use taxes. New York, New Jersey, and Connecticut have a Cooperative Interstate Sales and Use Tax Administration

[30] *See, e.g.*, Nev. Rev. Stat. 369.450(2)(a)(1) (2003); N.H. Rev. Stat. Ann. § 178:27(II) (2003); N.C. Gen. Stat. § 18B-1001.1(c)(1) (2004); N.D. Cent. Code § 5-01-16(5) (1987); Va. Code Ann. § 4.1-112.1(C) (Michie 2003); Wyo. Stat. Ann. § 12-2-204(d)(iv) (2003).

agreement to exchange sales and use tax information.[31] Under the agreement, participating vendors selling taxable goods and services across state lines voluntarily agree to collect the neighboring state's use tax. Sharing information about customers and purchases, improves use tax collection and increases state revenues. Some states have revised state income tax forms to address the failure of consumers to remit use taxes because they are not aware of use tax laws. They have done so by adding a line on state income tax forms requiring taxpayers to report the amount of purchases the taxpayer made from mail-order catalogs and online retailers.[32]

Enforcement. If out-of-state shippers fail to comply with license requirements, labeling and delivery requirements, or tax remittance, states have multiple means of enforcement available. First, states attach stiff penalties to violations of direct shipment laws. New Hampshire, one of the states identified in the FTC Report as having effectively implemented less restrictive means,[33] revokes the shipping permit of a person found to be shipping wine to minors and charges that person with a Class B felony. *See* N.H. Rev. Stat. Ann. § 178:27(VII) (2003). If, as a condition to being licensed, a shipper has submitted to the state's jurisdiction, the state can sue the shipper in state court. If the shipper is an unlicensed violator, the state has federal jurisdiction to

[31] *Available at* http://www.tax.state.ny.us/pdf/publications/Sales/Pub32_1196.pdf (last visited September 21, 2004).

[32] *See* North Carolina 2003 Individual Income Tax Form D-400 *available at* http://www.dor.state.nc.us/downloads/individual.html (last visited September 21, 2004). Michigan, Maine, Vermont and many other states have added similar lines to their tax forms. *See, e.g.*, Michigan 2003 Individual Income Tax Form MI-1040, *available at* http://www.michigan.gov/treasury/0,1607,7-121-1748_1904_1916-70176–,00.html (last visited September 21, 2004); Maine 2003 Individual Income Tax Form 1040S-ME, *available at* http://www.state.me.us/revenue/incomeestate/homepage.html (last visited September 21, 2004); Vermont 2003 Individual Income Tax Form IN-111, *available at* http://www.state.vt.us/tax/forms/formsindividual.htm (last visited September 21, 2004).

[33] *See* FTC Report at 27, 31-36, 38, 40.

sue for an injunction under the Twenty-first Amendment Enforcement Act, passage of which was supported by many state officials. 27 U.S.C. § 122a; *see also* FTC Report at 30. Finally, the FTC Report notes that if the state contacts the Alcohol and Tobacco Tax and Trade Bureau (TTB),[34] about the violation, TTB can revoke the shipping winery's federal permit once it determines that the shipper's violation has a "pronounced impact on the regulatory and/or criminal enforcement scheme of the state in question."[35] Without a federal permit, wineries are unable to do business anywhere in the country.

Effect. States that have adopted a licensing scheme report few problems with tax collection. *See* FTC Report at 38-39. These states have found that wineries generally comply voluntarily with licensing requirements, and that current means of enforcement are adequate to deal with those wineries that knowingly or unknowingly violate the law. *Id.* Furthermore, state concerns about revenue collection from interstate wine shipments are disproportionate to the relatively small amount of revenue states gain from taxes on interstate shipments of wine. Many states with reciprocity agreements – allowing direct shipments of wine to be made only between other states that offer the same reciprocal privilege – forego tax collection on interstate wine shipments altogether. *See* FTC Report at 39 n.166. There is no indication that these states have suffered serious economic consequences as a result. *Id.*

Contrary to the protestations of petitioners and *amici* otherwise, the FTC Report found that states that have instituted any or all of the less restrictive measures described above have reported few or no problems with direct shipments to minors. *See* FTC Report at 32-33.

[34] Formerly the Federal Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF).

[35] ATF, Industry Circular No. 96-3, Direct Shipment Sales of Alcohol Beverages (Feb. 11, 1997), *available at* http://www.atf.treas.gov/pub/ind_circulars/ic_96.3.htm (last visited September 21, 2004); FTC Report at 30-31.

These states find that licensing, labeling, and delivery requirements are effective in ensuring that wine is shipped only to adults. *See id.*[36]

The proven success of the less restrictive measures reported by the FTC reveals the fallacy of Michigan's insistence that its ban on direct shipments by out-of-state wineries, but not in-state wineries, is the only way in which to protect minors, consumers, and its treasury. Michigan has the burden of demonstrating both that such a ban materially advances these goals and the unavailability of less restrictive alternatives. But the existence of many less restrictive alternatives through which Michigan can achieve all of its asserted goals demonstrates that Michigan can do neither.

CONCLUSION

The Court should affirm the judgment in *Heald v. Engler*, 342 F.3d 517 (6th Cir. 2003).

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[36] With regard to direct shipments of wine to minors, Wisconsin reported "no complaints" and concludes "both that online sales to minors is 'not a serious problem' and that minors can obtain alcohol more easily through 'bricks and mortar' stores." FTC Report at 32, tbl. 3 (quoting from Wisconsin's response to the FTC questionnaire, located in App. B to the FTC Report). Similarly, the New Hampshire Liquor Commission reported that "there may be some instances where [shipment to minors] is occurring but we have very little evidence in this area and do not believe this is a serious problem at this time. . . . [T]he high cost of shipping and the fact that the minor has to wait for wine to arrive makes purchasing wine at a local retail[er] more desirable." *Id.* (quoting from New Hampshire's questionnaire response in App. B). The Illinois Liquor Control Commission (ILCC) stated that it

> has received no reports regarding minors obtaining wine from out-of-state shippers . . . I do not believe many minors would opt to purchase wine online due to the increased cost over brink-and-mortar [sic] establishments and due to the product itself, as my experience indicates minors would probably choose to purchase other alcoholic products over wine. I believe the direct shipment of wine to minors is . . . not a serious problem.

FTC Report at 32 (quoting Illinois's response to FTC questionnaire in App. B to FTC Report).

Respectfully submitted,

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(11) (8)

No. 03-1116 and No. 03-1120

Supreme Court, U.S.
FILED
JUL 29 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

JENNIFER M. GRANHOLM, ET AL.,

Petitioners,

v.

ELEANOR HEALD, ET AL.,

Respondents.

MICHIGAN BEER & WINE WHOLESALERS ASSOCIATION,

Petitioner,

v.

ELEANOR HEALD, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF MICHIGAN ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS, COMMITTEE FOR A CONSTRUCTIVE TOMORROW, AMERICAN TRAUMA SOCIETY, KIDS FIRST COALITION, TRAFFIC SAFETY ASSOCIATION OF MACOMB COUNTY, TRAFFIC SAFETY ASSOCIATION OF MICHIGAN, INC., NEIGHBORHOOD ACTIVISTS INTER-LINKED EMPOWERMENT MOVEMENT, AMERICAN VALUES, CONCERNED WOMEN FOR AMERICA, EAGLE FORUM, SIXTY PLUS, AND NATIONAL ASSOCIATION OF EVANGELISTS, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

In its Order of May 24, 2004, this Court granted certiorari to consider the following question:

> Does a State's regulatory scheme that permits in-state wineries directly to ship alcohol to consumers but restricts the ability of out-of-state wineries to do so, violate the dormant Commerce Clause in light of Sec. 2 of the Twenty-first Amendment?

PARTIES TO THE PROCEEDING

The Governor, the Attorney General, and the Chairperson of the Liquor Control Commission of the State of Michigan ("Michigan" or "State") were defendants-appellees below and are petitioners in No. 03-1116. The Michigan Beer & Wine Wholesalers Association ("MB&WWA"), a trade association of Michigan beer and wine wholesalers, was an intervening defendant-appellee below and is a petitioner in No. 03-1120.

Respondents in both No. 03-1116 and No. 03-1120 were plaintiffs-appellants below and are individuals Eleanor Heald; Ray Heald; John Arundel; Karen Brown; Richard Brown; Bonnie McMinn; Gregory Stein; Michelle Morlan; William Horwath; Margaret Christina; Robert Christina; Trisha Hopkins; Jim Hopkins; and winery Domaine Alfred, Inc.

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

The *Amici Curiae* believe this case to be of tremendous importance to the welfare of persons under the age of 21 ("minors"), because the relief requested by Respondents would greatly increase the access by minors to alcohol, which already is at crisis level, and would render state alcohol regulation unenforceable. The attendant increase in consumption of alcohol by minors would result in a corresponding increase in deaths, injuries, and other alcohol related problems to minors, their families and their victims.

The Michigan Association of Secondary School Principals is committed to the improvement of secondary education (5th through 12th grades) in the State of Michigan, and has worked with the Governor's office, the Michigan Legislature, and the Michigan Department of Education to improve education, identify obstacles, and resolve problems affecting students in middle and high schools.

The Committee for a Constructive Tomorrow is a national non-profit corporation with 40,000 supporters and is charged with promoting socially responsible consumer public policies.

The American Trauma Society is a national non-profit association with 2,000 members created to save lives through improved trauma care and injury prevention.

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[1] Pursuant to Sup. Ct. R. 37.6, *Amici* affirm that none of the *Amici* have a financial or commercial relationship with any of the parties to this case. This brief has been prepared solely by counsel for the *Amici*. No monetary contributions to the preparation and submission of this brief have been made by any person or entity other than the *Amici*, their members, or their counsel.

The Traffic Safety Association of Macomb County, Michigan, seeks to address significant issues related to highway safety, to reduce deaths, injuries, and property losses due to traffic collisions.

The Traffic Safety Association of Michigan, Inc. is a state-wide, non-profit corporation dedicated to providing traffic safety education and information for Michigan motorists and citizens.

The Neighborhood Activists Inter-Linked Empowerment Movement is a statewide Arizona non-profit organization, with 30,000 supporters dedicated to providing the public with tools to protect their neighborhoods and resolve neighborhood issues.

The Kids First Coalition is a grassroots organization of parents, grandparents, and future parents dedicated to advancing pro-child and pro-family policies and educating the country on the needs of children.

American Values is a non-profit national organization that works to educate public policy makers on issues affecting the welfare of families, which include protecting children from ready access to alcohol.

The Concerned Women for America is a national non-profit, non-partisan organization charged with promoting public policies to benefit women and families.

Eagle Forum is a national women's organization that promotes pro-family public policies.

Sixty Plus is a non-partisan national seniors' group that advocates on issues affecting the health and welfare of seniors.

National Association of Evangelicals is a non-profit association of evangelical Christian denominations, churches, organizations, institutions, and individuals that includes more than 45,000 local churches from 51 different denominations.

These diverse organizations have come together as *Amici* to oppose the efforts of Respondents to invalidate state statutes regulating the direct shipping of alcohol, which would cause a major increase in the number of alcohol-related traffic fatalities, injuries, assaults, and other crimes, especially among our youths.

SUMMARY OF ARGUMENT

Section 2 of the Twenty-first Amendment to the United States Constitution grants the states sweeping authority to regulate alcohol trafficking in recognition of states' historical police powers, the need for state-based alcohol regulation to address local issues and concerns, and the need for an effective means of enforcement of such regulations.

Fundamental alcohol regulation requires control over what types of alcoholic products will be sold; who will be permitted to sell and to buy alcohol; and how to ensure accountability for such sales. Michigan and most other states do not permit sales from out-of-state sources to be delivered directly to in-state purchasers because no feasible and practical enforcement mechanism can provide fundamental control over such sales.

All 50 states prohibit sales of alcohol to minors. If the states cannot control direct shipping, the states cannot protect against illegal sales to minors.

Pointing to a single element of a complex regulatory system that superficially appears to grant in-state wineries a "preference" of local delivery not granted to out-of-state wineries, Respondents seek to eliminate statutes prohibiting direct shipping.

In doing so, Respondents ignore the critical differences between in-state and out-of-state wineries. The state imposes a heavy burden of licensing, regulation, and enforcement on in-state wineries, and can impose serious penalties for non-compliance, including license revocation. The same level of regulation and enforcement cannot realistically be imposed on out-of-state wineries.

Moreover, the claim of disparate treatment of in-state and out-of-state wineries is a ruse. Respondents do not ask for the in-state "preference" to be struck down; their sole purpose is to eliminate state regulation of shipments of alcohol from out-of-state.

Also of concern are the ramifications of the Court's decision beyond the confines of the case. Although the certified question mentions only wineries, striking the prohibition against direct shipping would permit direct shipping from not only the 3,000 United States wineries, but also the thousands of other wineries worldwide. Moreover, producers of beer and spirits also would be able to ship their products, as would hundreds of thousands of out-of-state retailers.

It is this threat of deregulation, the concomitant expansion of alcohol access by underage persons, and the catastrophic consequences of this increased access that join the diverse *Amici* in this brief.

ARGUMENT

THE IMPORTATION AND SALE OF ALCOHOLIC BEVERAGES MUST BE CLOSELY REGULATED BY THE STATES TO PROTECT AGAINST UNFETTERED ACCESS TO ALCOHOL BY MINORS.

A. Alcohol Trafficking Historically Has Been Heavily Regulated By The States.

Because of its potential for abuse, the importance of an enforceable system of alcohol regulation has long been recognized. Trafficking in alcohol has been the subject of two Constitutional amendments,[2] as well as federal legislation clarifying the nearly absolute authority of the states over alcohol trafficking.[3] No other consumer product has received the same level of attention. As the Seventh Circuit noted in *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000), *cert. denied, sub nom., Bridenbaugh v. Carter*, 532 U.S. 1002 (2001), a state may "control alcohol in ways that it cannot control cheese."

B. Preventing Underage Alcohol Access And Consumption Is The Public Policy Of All 50 States, And Is Fully Supported By The United States Government.

Particular concerns about the consequences of youth drinking resulted in the enactment of the National Minimum

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[2] U.S. Const. amend. XVIII prohibited all manufacture and sale of alcohol; the Twenty-first Amendment repealed the Eighteenth Amendment, but in doing so, through § 2, expressly placed authority to control alcohol with the states. A proposed § 3 to the Twenty-first Amendment would have provided dual jurisdiction over alcohol regulation with the federal government, but was defeated.

[3] Wilson Act, 27 U.S.C. § 121; Webb-Kenyon Act, 27 U.S.C. § 122.

Drinking Age Act[4] in 1984, which threatened the loss of certain federal funding, prompted all of the states that had not yet done so, to set a minimum age of 21 for drinking alcohol. This Act has been credited with saving more than 20,000 young lives in the 20 years since enactment.[5]

In spite of these gains, underage access to alcohol and the related loss of lives, injuries, and other societal costs resulting from underage drinking remain a serious problem. On July 21, 2004, the STOP Underage Drinking Act[6] was introduced in the House of Representatives.

Among the Congressional Findings of the Act are:

(1) Drinking alcohol under the age of 21 is illegal in each of the 50 States and the District of Columbia. Enforcement of current laws and regulations in States and communities, *such as minimum age drinking* laws, zero tolerance laws, and *laws and regulations which restrict availability of alcohol*, must supplement other efforts to reduce underage drinking.

(2) Data collected annually by the Department of Health and Human Services shows that alcohol is the most heavily used drug by children in the United States, and that –

(A) more youths consume alcoholic beverages than use tobacco products or illegal drugs;

[4] 23 U.S.C. § 158.

[5] Mothers Against Drunk Driving, http://www.madd.org/aboutus/0,1056,1986,00.html (last visited July 24, 2004).

[6] H.R. 4888, 108th Cong. (2004).

(B) by the end of the eighth grade, 45.6 percent of children have engaged in alcohol use, and by the end of high school, 76.6 percent have done so; and

(C) the annual societal cost of underage drinking is estimated at $53 to $58 billion.

(3) Data collected by the Department of Health and Human Services and the Department of Transportation indicate that alcohol use by youth has many negative consequences, such as immediate risk from acute impairment; traffic fatalities; violence; suicide; and unprotected sex.

(4) Research confirms that the harm caused by underage drinking lasts beyond the underage years. Compared to persons who wait until age 21 or older to start drinking, those who start to drink before age 14 are, as adults, four times more likely to become alcohol dependent; seven times more likely to be in a motor vehicle crash because of drinking; and more likely to suffer mental and physical damage from alcohol abuse.

(5) Alcohol abuse creates long-term risk developmentally and is associated with negative physical impacts on the brain.

(6) Research indicates that *adults greatly underestimate the extent of alcohol use by youths*, its negative consequences, and its use by their own children. The IOM report concluded that underage drinking cannot be successfully addressed by focusing on youth alone. Ultimately, adults are responsible for young people obtaining alcohol by selling, providing, or otherwise making it available to them.

* * *

(8) *A significant percentage of the total alcohol consumption in the United States each year is by underage youth. The Substance Abuse and Mental Health Services Administration reports that the percentage is over 11 percent.*

* * *

(14) College and university presidents have cited *alcohol abuse as the number one health problem* on college and university campuses.

(15) According to the National Institute on Alcohol Abuse and Alcoholism, two of five college students are binge drinkers; 1,400 college students die each year from alcohol-related injuries, a majority of which involve motor vehicle crashes; more than 70,000 students are victims of alcohol-related sexual assault; and 500,000 students are injured under the influence of alcohol each year.

* * *

(18) According to the Government Accounting Office ('GAO'), the Federal Government spends $1.8 billion annually to combat youth drug use and $71 million to prevent underage alcohol use. (emphasis added)

H.R. 4888, § 101 further provides that:

It is the sense of the Congress that:

(1) A multi-faceted effort is needed to more successfully address the problem of underage drinking in the United States. . . .

(2) States and communities, including colleges and universities, are encouraged to adopt comprehensive prevention approaches, including –

* * *

(C) consistent policy enforcement; and

(D) environmental changes that limit underage access to alcohol.

(3) Public health and consumer groups have played an important role in drawing the Nation's attention to the health crisis of underage drinking. Working at the Federal, State, and community levels, and motivated by grass-roots support, they have initiated effective prevention programs that have made significant progress in the battle against underage drinking.

Finally, H. R. 4888 requires the Secretary of Health and Human Services to "annually issue a 'report card' to accurately reflect the performance of each state in enacting, enforcing, and creating laws, regulations, and programs to prevent or reduce underage drinking."[7]

The measures upon which the states will be rated include:

(A) *The degree of strictness of the minimum drinking age laws* and dram shop liability statutes in each State.

(B) The number of compliance checks conducted within alcohol retail outlets measured against the number of total alcohol retail outlets in each State, and the results of such checks.

(C) Whether or not the State mandates or otherwise provides training on the proper selling and serving of alcohol for all sellers and servers of alcohol as a condition of employment.

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[7] H.R. 4888, § 202, 108th Cong. (2004).

(D) Whether or not the State *has policies and regulations with regard to Internet sales and home delivery of alcoholic beverages.*[8] (emphasis added)

Thus, it is apparent that although the Respondents may be naïve or disingenuous enough to assert that deregulation of alcohol shipping will have no impact on underage drinking, Congress is not.

C. Direct Shipping Of Alcohol Will Increase Minors' Access To Alcohol.

Respondents disparage the notion that directly shipping alcohol from out-of-state to private residences will increase underage drinking. Variously, Respondents have contended that no evidence exists that minors are purchasing alcohol from direct shippers; minors do not have the monetary resources or desire to buy costly, upscale wines; minors seeking to purchase alcohol will obtain the alcohol only from sources that provide them with immediate access; the ease with which minors can obtain access to alcohol from in-state party stores and bars make it unlikely that they will seek out alternative sources; and age verification by delivery personnel is sufficient to ensure that minors do not receive shipments of alcohol.

Real world experiences refute these claims.

[8] *Id.*

1. As local law enforcement efforts reduce the opportunities to obtain alcohol from in-state licensed retailers, minors will seek alternative ways to obtain alcohol.

Michigan, among other states, has substantially increased enforcement efforts to reduce in-state sales of alcohol to minors. Although the problem is far from being eliminated, significant reductions in such sales have been achieved. Michigan now requires alcohol management training for new licensees as a condition of licensing.[9] Underage drivers' licenses have been modified to make identification easier, most recently by issuing vertical licenses to minors, and horizontal licenses to those over 21, and by providing the date upon which the driver will turn 21.[10] Licenses now have holographic images and data strips to make forgery more difficult.

For obvious reasons, neither minors illegally purchasing alcohol nor the retailers selling to them self-report their crimes. Thus, the primary way to assess the effectiveness of deterrent measures in-state has been through controlled buy investigations ("stings") in which a minor under the supervision of law enforcement attempts to purchase alcohol. Other than these stings, illegal alcohol purchases and consumption typically come to light only when law enforcement officers are called to the site of a traffic crash or investigate rapes, assaults, and other alcohol related offenses.

[9] MCL 436.1906; 1979 AC, R. 436.1060.

[10] http://www.michigan.gov/sos/0,1607,7-127--70561--,00.html (last visited July 23, 2004).

Detecting illegal purchases made by a minor from an out-of-state seller over the internet, by phone, or through catalog sales, where the alcohol is then delivered to the minor's doorstep, is more difficult yet. The only reliable way to measure the ease of access is through stings involving minors placing orders to determine whether the sellers require proper age verification at the time of the orders and first determine whether delivery companies verify that the recipients are over 21.

Respondents have argued that only minors participating in the stings are purchasing alcohol from out-of-state, that no evidence exists outside of the stings. This argument is identical to the argument proffered by in-state retailers when in-state stings were first implemented. The fundamental flaw in this argument is that neither retailers nor minors voluntarily turn themselves in for prosecution following a sale. Absent decoy stings, sales to minors typically are identified only when the minor is involved in an alcohol related offense. Accordingly, direct evidence of sales to minors outside of stings is very limited. The best evidence that minors have easy access to alcohol from remote sellers continues to be the result of decoy stings.

A number of such stings have shown that it is all too easy for minors to purchase alcohol for direct shipment from out-of-state.

In mid-1999, the Michigan Attorney General and the Liquor Control Commission conducted a series of stings, which revealed that most alcohol sellers were far more concerned about the validity of the credit card number

than the age of the purchaser.[11] About one in three sites contacted agreed to sell alcohol to the minor purchaser with no more age verification than a "click" of the mouse. United Parcel Service personnel delivered the purchases without verifying the age of the minor recipient. Since that time, Michigan has intercepted and seized over a thousand bottles of illegally shipped wine, beer, and spirits. Nearly 2/3 of the shipments were from alcohol retailers, *not* wineries.[12]

In the fall of 2003, students enrolled in a Public Health class at the University of Tennessee teamed with the Knox County Sheriff's Department and the Knoxville chapter of Mothers Against Drunk Driving to determine whether alcohol could be obtained by a minor over the internet. The students successfully made and had delivered purchases of alcohol from out-of-state retailers without age verification.[13]

More recently, in Massachusetts, stings resulted in multiple sales and delivery of alcohol to underage buyers making their purchases over the internet.[14]

Where enforcement efforts are successfully reducing the number of sales to minors at in-state licensed establishments, it should be expected that a greater percentage of remote sellers would sell to minors than would in-state retailers.

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[11] http://www.ag.state.mi.us/press_release/archive/pr10163.htm (last visited July 25, 2004).

[12] *Id.*

[13] WBIR-TV (NBC), Knoxville, TN, reported on November 12, 2003.

[14] http://www.ago.state.ma.us/sp.cfm?pageid=986&id=1241 (last visited 13, 20 July 23, 2004).

First, a remote sale does not involve a face-to-face transaction. In-state retailers approached by a minor to purchase alcohol have an opportunity to observe the purchaser directly, to assess nervousness and other mannerisms that indicate the person may not be of legal age to purchase, and to closely scrutinize a government-issued picture identification. Michigan requires "diligent inquiry" to verify age, which is defined as, "at least an examination of an official Michigan operator's or chauffeur's license, an official Michigan personal identification card, or any other bona fide picture identification which establishes the identity and age of the person."[15] This requirement simply cannot be met by a "click" of the mouse or a faxed (and easily altered) copy of a license.

Second, in-state licensed wineries and retailers risk their state liquor license – their very livelihood – if they sell to minors. Out-of-state wineries and retailers have little to lose, since, in the rare event that the illegal sale is identified, their licenses are not at risk and out-of-state prosecutions are exceptionally difficult and prohibitively costly to pursue.

No system for verification of age has been identified that can adequately protect against alcohol purchases by minors from out-of-state sellers.

2. Underage Buyers have incentive and financial resources to purchase alcohol for direct shipment.

Respondents have suggested that minors will not buy costly upscale wines. This premise presumes that minors

[15] MCL 436.1701(10)(b).

have little discretionary money and that they have no interest in fine wines. The first presumption is false and the second presumption is irrelevant.

The discretionary income of minors is not perceived as minimal by those who market to this demographic. Studies by Teen Research Unlimited, a market-research firm that focuses on the teen market, estimated that teens in the United States from ages 12 to 19 spent $175 billion in 2003.[16] The average high school teen spends $66.00 weekly.[17]

Moreover, the use of credit cards by teenagers has mushroomed. Approximately 1 in 5 teens ages 12 to 19 have and use a credit card.[18] Nearly 80% of teens ages 18 to 20 years have their own credit card.[19] Persons entering college are offered an average of 8 credit cards the first week of school.[20]

And teens do use their credit cards, often to their detriment. Undergraduate college students carry an average of three credit cards each,[21] and 20% of those

[16] http://www.teenresearch.com/PRview.cfm?edit_id=168 (last visited July 23, 2004).

[17] http://cardweb.com/cardlearn/faqs/2003/november/21.xcml (last visited July 17, 2004).

[18] Young Americans Center for Financial Education, http://www.yacenter.org/index.cfm?fuseAction=financialLiteracyStatistics (last visited July 17, 2004).

[19] http://cardweb.com/cardlearn/faqs/2002/sep/24.xcml (last visited July 17, 2004).

[20] Young Americans Center for Financial Education, http://www.yacenter.org/index.cfm?fuseAction=financialLiteracyStatistics (last visited July 17, 2004).

[21] Louisiana State University Agricultural Center, Youth Financial Literacy Statistics, http://www.lsu.edu (last visited July 17, 2004).

students who carry balances on their cards have debts of more than $10,000.[22] University administrators state that they lose more students to credit card debt than to academic failure.[23]

The second presumption, that minors have no interest in fine wines, is irrelevant, since wineries and retailers do not limit their offerings to high end wines for those with sophisticated palates. Although Respondents continue to characterize this case as limited to wine connoisseurs and enthusiasts seeking rare fine wines, however those are defined in fact, the statutes they seek to invalidate are not so limited. The alcohol controlled by the state's three-tier system include wine coolers, beer, rums, tequilas, flavored vodkas, and other similar products favored by young drinkers. 35% of all wine coolers sold in the United States are consumed by junior high, middle school, and high school students.[24] The ability to obtain these products without a face-to-face purchase is particularly attractive to the younger and more youthful appearing teens.

Respondents also have contended that wineries do not *market* to youthful drinkers. Again, this case is not exclusively about wineries. The statutes in question regulate beer and spirits sales as well. Moreover, even if the case were limited to wine, many wine sites either are directed at youth, or contain links to youth oriented wine sites.

[22] Virginia Credit Union League, citing statistics obtained from the American Bankruptcy Institute, the Federal Reserve, and the National Endowment for Financial Education, http://www.vacul.org/fin_lit/stats.htm (last visited July 17, 2004).

[23] http://www.louisiana.tomorrowsmoney.org/information.cfm/youth/eng (last visited July 23, 2004).

[24] www.wirthlin.com.

Sites such as Wine X Wired,[25] which features "Wine Bitch," "X-Rated Wines," "Winebrats," "G-Spot," "WineRave," and "Sex, Wine & Rock N' Roll" clearly are aimed toward youth.

One of the first studies to explore Internet marketing of alcohol and tobacco to minors was conducted by the Center for Media Education (CME):

> The study found that alcohol and tobacco companies are using the online media to advertise and promote their products, through a variety of marketing techniques that capitalize on the medium's strong and unique attraction for young people.[26]

In December 1998, the CME published an update to the original study.[27] This study examined 77 beer, wine, and spirits Internet sites, and concluded that 62% of the sites included elements appealing to youth. The study discussed the marketing techniques:

> The sites that appear to appeal to youth often strive to create a community of brand-loyal enthusiasts, a place where lonely teens can talk, find peers and support for risky activities like binge drinking. Known among marketers as relational advertising, this effort to build a relationship between the user and the product is the dominant trend in marketing on the Web and is already heavily exploited by the alcohol industry.

[25] www.winexwired.com/toc.htm (last visited July 24, 2004).

[26] *Alcohol and Tobacco on the Web: New Threats to Youth*, March 1997.

[27] *Alcohol Advertising Targeted at Youth on the Internet: An Update*, December 1998.

It is thus apparent that internet alcohol websites do market to teens, and teens have the ability and interest in purchasing online.

3. Minors are willing to purchase alcohol from direct shippers if their age is less likely to be verified and they are less likely to be caught, even if the purchase entails a slight delay until receipt.

Respondents also have contended that minors want immediate access to alcohol, and won't wait for shipment from a remote seller. The Wirthland Worldwide study of college students[28] conducted for Americans for Responsible Access for Alcohol[29] suggests otherwise, finding that 17,609 students in the survey reported having purchased beer, wine, or liquor over the internet, by toll-free phone order, or by mail-order catalog. Obviously, a delay in receiving the alcohol did not stop these sales. The Wirthland study also found that 80% of the students surveyed said their peers are likely to purchase alcohol online if no age verification is required.

Moreover, the delay between ordering and delivery of alcoholic products can be minimal. Most alcohol websites offer a variety of delivery options, ranging from UPS Ground to FedEx Preferred Overnight, the latter of which

[28] www.wirthlin.com.

[29] ARAA's members and supporters include, *inter alia*, the Virginia Attorney General, Students Against Destructive Decisions (SADD), the National Association of Governors' Highway Safety Representatives, the American Academy of Pediatrics, the Virginia Alcohol Control Board, the American Council of Alcoholism, and the National Transportation Safety Board.

guarantees delivery by 10:30 a.m. the morning following the order.[30]

Thus, a minor wishing to purchase a case of grain alcohol from Randall's Wines and Spirits (www.internet wines.com)[31] for a Friday "party punch" could order it on the preceding Monday for regular delivery, or he could wait to order it until late Thursday and still have it arrive on Friday morning by adding only $20 more to the shipment cost.

4. Common carrier delivery personnel do not properly verify the age of the person accepting shipments.

Respondents also suggest that the burden of age verification should be with delivery personnel who can be trained to properly validate age. The stings in Michigan, Tennessee, and Massachusetts showed that common carrier delivery personnel were *not* effective at verifying that the recipients of packages containing alcohol were at least 21 years old.

In the Michigan stings discussed previously, UPS delivered the illegal shipments without proper age verification of the recipients. The sting investigations by the

[30] See, *e.g.*, Prime Wines, http://www.primewines.com/content_shipping.asp ("Most orders are delivered within 48 hours of confirmation. . . . Express Delivery is available"), Internet Wines and Spirits, http://www.internetwines.com/shippingrates.html ("In most cases, in-stock items will ship same-day when ordered before 8:00 am central time. Overnight and 2nd Day orders placed after 8:00 am central time will be shipped the next business day.") (Both sites last visited July 24, 2004).

[31] www.internetwines.com (last visited July 24, 2004).

University of Tennessee[32] and the state of Massachusetts[33] also found that delivery personnel failed to verify age, even where the packages identified the contents as alcohol and had labels stating that age verification was necessary.

Common carrier delivery personnel are trained to deliver *packages* – that is the business of and source of revenue for the delivery company. Delivery personnel, whose mission is to deliver as many packages in as short a time as possible, are only hampered in achieving their goal by requirements of age verification.

The common carrier and its personnel make money from the delivery of packages, not from selling alcohol. Demanding that delivery personnel conduct ID checks is not an effective and reliable method of verifying age.

D. Alcohol Regulation Is Not Possible Without Enforcement Capability.

Enforcement efforts against out-of-state entities are prohibitively difficult and costly. If direct shipping is permitted, out-of-state sellers simply cannot be subject to the same standards and enforcement as in-state retailers.

In-state retailers and wineries are subject to rigorous investigation in order to become licensed, which requires, among other things, extensive disclosure of financial documents, on-site inspections of proposed license premises, and policy background checks.[34] Once licensed, they

[32] WBIR-TV (NBC), Knoxville, TN; reported on November 12, 2003.

[33] http://www.ago.state.ma.us/sp.cfm?pageid=986&id=1241 (last visited July 23, 2004).

[34] MCL 436.1101, et seq.; 1979 AC, R. 436.1101-436.1531.

must comply with a multitude of statutory requirements and rules designed to protect the consuming public. Retailers bear the burden of ensuring that sales are not made to minors or intoxicated persons; that sales are made only during hours authorized by statute; that sales are not made in violation of local option laws; that only safe, approved products are sold; that spirit sales are made in accordance with state-mandated price controls; and that appropriate taxes are collected and remitted to the state.[35] Retailers are held responsible for improper or illegal sales with penalties ranging from fines to suspension or revocation of their liquor licenses.[36] Dram-shop laws place liability on retailers for injuries and deaths resulting from sales to minors or visibly intoxicated individuals.[37]

These stringent requirements protect consumers from unlawful sales by requiring that alcoholic beverages be sold and distributed to consumers only by persons who are responsible and can be held accountable. In-state retail licensees are accountable to and reachable by the State, because non-compliance with the law may subject them to fines, suspension, or revocation of their liquor licenses and even criminal prosecution.

A decoy sting on an in-state retailer is simple: The minor attempts to make a purchase with cash furnished by law enforcement and immediately is either sold or turned away. A decoy team can make many stops in a single outing.

[35] *Id.*

[36] MCL 436.1901, et seq.

[37] MCL 436.1801.

A decoy sting on an out-of-state retailer is more costly and time-consuming: The minor must have a credit card in his own name and must be present for delivery. Following such a sale and delivery, the actual seller must be identified for further enforcement effort.

Establishing the true identity of the seller from the Internet website name or assumed name is frequently difficult. The seller's website often provides few clues to the name of the seller or its location. As an example, the Internet site www.internetwines.com is operated by Randall's Wine & Spirits, and "Out of Africa" is the assumed name for S.A. Wines, Inc., a California company specializing in selling wines from Africa and South America. Further, once located, out-of-state sellers typically dispute jurisdiction, refuse service, or ignore communications sent to them. There is no state-issued license to fine or revoke, and the seller assumes little risk by selling in a manner that would never be permitted for in-state licensees.

Applying and enforcing the state's liquor laws "equally" on in-state and out-of-state wineries and retailers, so casually suggested by the Respondents as a panacea, is based on a superficial, simplistic, and flawed understanding of liquor control regulation and enforcement.

There is not a state in the union that could afford to fund regulation of the hundreds of thousands of out-of-state retailers and wineries the same way it regulates its in-state retailers and wineries.

E. The Ramifications Of The Court's Decision In This Case Extend Well Beyond Wine And Wineries.

Because wineries selling and shipping their own products are acting as retailers for their wines, little distinction exists between these wineries and retailers who want to ship alcoholic beverages produced by others. Literally hundreds of thousands of alcohol retailers in the United States are affected in the same way as the wineries by the direct shipping laws. Add to these the breweries, distilleries, and retailers from around the world, and the numbers become mind-boggling.

The burden placed on a state to apply the level of oversight, investigation, and enforcement it imposes on in-state wineries and retailers is impossible to impose on virtually an unlimited number of out-of-state alcohol sellers.

As the Court is well aware, laws and regulations are worthless without a real ability to enforce them. Permitting direct shipments would render Michigan's regulatory system unenforceable against all out-of-state sellers.

CONCLUSION

Alcohol regulation and control continues to be a necessary adjunct to alcohol sale and distribution, because alcohol *is* different from most other products and because of the damage that results from its overuse and abuse. Every state has committed to protection of our minors, yet minors will be placed at the greatest risk of injury if state laws prohibiting direct shipping are stricken.

Accordingly, *Amici* urge the Court to enforce states' rights under the Twenty-first Amendment to the Constitution, and reverse the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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IN THE

Supreme Court of the United States

JENNIFER M. GRANHOLM, GOVERNOR OF MICHIGAN, *et al.*,
Petitioners,

v.

ELEANOR HEALD, *et al.*,
Respondents.

MICHIGAN BEER & WINE WHOLESALERS ASSOCIATION,
Petitioner,

v.

ELEANOR HEALD, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICI CURIAE* NAPA VALLEY VINTNERS, SONOMA COUNTY WINERIES ASSOCIATION, MONTEREY COUNTY VINTNERS AND GROWERS ASSOCIATION, EL DORADO WINERY ASSOCIATION, AMADOR VINTNERS' ASSOCIATION, TEMECULA VALLEY WINEGROWERS ASSOCIATION, AND SANTA CRUZ MOUNTAINS WINEGROWERS' ASSOCIATION IN SUPPORT OF RESPONDENTS

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Whether a State's regulatory scheme that permits in-state wineries directly to ship alcohol to consumers but restricts the ability of out-of-state wineries to do so violates the dormant Commerce Clause in light of Section 2 of the 21st Amendment?

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INTEREST OF *AMICI CURIAE*[1]

Amici are organizations whose members are vintners and winegrowers located throughout the State of California. California is one of the oldest wine-growing regions in the country. Its vintners have long sold wine not only to consumers in California but nationwide. For example, at issue in *Scott* v. *Donald*, 165 U.S. 58 (1897), one of the key nineteenth century Commerce Clause discrimination cases discussed in some detail below, was the ability of vintners in California to sell their wines in South Carolina through the state dispensary on terms equal to those of South Carolina's vintners. Although much has happened since those early battles over 100 years ago, California vintners continue to have a strong interest in ensuring that the Commerce Clause affords them non-discriminatory access to consumers throughout the United States.

Amici are described in the Appendix and include Napa Valley Vintners, Sonoma County Wineries Association, Monterey County Vintners and Growers Association, El Dorado Winery Association, Amador Vintners' Association, Temecula Valley Winegrowers Association, and Santa Cruz Mountains Winegrowers' Association.

SUMMARY OF ARGUMENT

The Court has recognized that Section 2 of the Twenty-first Amendment effectively enshrined in the Constitution the powers granted the States by the Webb-Kenyon and Wilson Acts. See *Craig* v. *Boren*, 429 U.S. 190, 206 (1976). This Court has never had occasion to review in any detail, however, the implications of those Acts, and of the decisions of this Court that prompted and construed them, to ascertain

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[1] Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, its members, or its counsel made a monetary contribution to the preparation of this brief. All parties have consented to the filing of this brief, and copies of the consents have been filed with the Clerk.

the scope of Section 2. Such a review is particularly appropriate for this case, for it refutes conclusively the notion that Section 2 repealed the anti-discrimination principle of the Commerce Clause. U.S. Const. art. I, § 8.

Instead, the history of Section 2 reveals that Congress was concerned with an entirely different Commerce Clause problem, the "immunity" from burdensome state laws that was afforded to liquor once it was placed in interstate commerce. That immunity meant that States with laws that prohibited the manufacture and sale of domestically produced liquor could not apply those laws even-handedly to imported liquor: they could neither intercept shipments of such liquor into their state nor bar its sale. The Twenty-first amendment eliminated that immunity, but had no effect whatsoever upon the longstanding prohibition against protectionist state laws that discriminated in favor of in-state producers.

Prior to the enactment of the Webb-Kenyon Act, this Court repeatedly struck down state liquor laws under the Commerce Clause. In one line of cases, the Court declared unconstitutional state laws that imposed discriminatory taxes on imported liquor while exempting domestic liquor, as well as other laws that discriminated against imported liquor. See *Scott* v. *Donald*, 165 U.S. 58 (1897); *Walling* v. *Michigan*, 116 U.S. 446 (1886); *Tiernan* v. *Rinker*, 102 U.S. 123 (1880).

In a second line of cases, the Court struck down state laws that, although non-discriminatory, imposed direct and impermissible burdens on interstate commerce in liquor. See *Rhodes* v. *Iowa*, 170 U.S. 412 (1898); *Leisy* v. *Hardin*, 135 U.S. 100 (1890); *Bowman* v. *Chi. & N.W. Ry.*, 125 U.S. 465 (1888). The Court in *Leisy* explained that shipments of liquor across state lines are in interstate commerce, and hence are "immune" from state regulation until after the liquor has been sold in its original package, even though the State may prohibit the sale of domestic liquor. 135 U.S. at 124.

In response to the holding in *Leisy*, Congress passed the Wilson Act of 1890. That Act did not empower a State to discriminate in favor of its local liquor industry. *Scott*, 165 U.S. at 100-01. Instead, the Wilson Act allowed States to prohibit the sale of imported liquor, regardless of whether it was in its original package. *In re Rahrer*, 140 U.S. 545, 564 (1891). Nonetheless, the Court held that the immunity of liquor in interstate commerce persisted under the Wilson Act, and thus States could not prohibit importation of liquor for personal use. *Rhodes*, 170 U.S. at 422-23.

To close the loophole opened by *Rhodes*, Congress passed the Webb-Kenyon Act. That Act gave States the power to block the importation of liquor for use in violation of state law, *Clark Distilling Co.* v. *Western Maryland Railway*, 242 U.S. 311, 324 (1917), but it did not empower them to discriminate. The effect of the Webb-Kenyon Act on the holdings in *Rhodes*, *Leisy* and *Bowman*, regarding the immunity of imported liquor from state regulation, was mentioned repeatedly in the congressional debates on the Act. Conversely, there is nothing in the language, purpose or history of the Webb-Kenyon Act that suggests that it was designed to change the rule against discriminatory regulation in *Scott*, *Walling* and *Tiernan*.

The history of the Twenty-first Amendment thus demonstrates that Section 2 of the Amendment was intended simply to "constitutionaliz[e] the Commerce Clause framework established under [the Webb-Kenyon and Wilson Acts]" after the repeal of Prohibition. *Craig*, 429 U.S. at 206. The Senate debates demonstrate that Section 2 was needed to secure the Webb-Kenyon Act against both repeal by Congress and constitutional attack. The debates make clear that the purpose and effect of Section 2 is to lift the "immunity" from state regulation that otherwise would attach to liquor in interstate commerce so that liquor could be intercepted before it reached the "consignee." Section 2 thus was coincident with, and did not extend, the Webb-Kenyon Act. There was

no suggestion that Section 2 was needed to permit States to discriminate. Had Section 2 been intended to change the longstanding rule against discriminatory state regulation of liquor, someone would have mentioned it explicitly.

Finally, the history and purpose of Section 2 are consistent with the Court's post-Amendment caselaw. In recent decades, the Court has recognized that a broad (and as shown here, wholly ahistorical) reading of the Twenty-first Amendment that would obliterate the anti-discrimination principle of the Commerce Clause is unwarranted. But even the Court's first decision construing the Twenty-first Amendment, *State Board of Equalization* v. *Young's Market Co.*, 299 U.S. 59 (1936), is consistent with the history of the Amendment. Despite the breadth of certain language in its opinion, the Court in *Young's Market* had no occasion to determine whether the Twenty-first Amendment overturned the Court's long line of cases declaring unconstitutional discriminatory state liquor laws because the Court determined that the case simply did "not present a question of discrimination prohibited by the commerce clause." *Id.* at 62. *Young's Market* involved only a fee that imposed a "direct burden" on interstate commerce, and thus the holding there was fully consistent with the scope of Section 2, which ensures that States may enforce even-handed laws against liquor products in interstate commerce without facing claims that those products are immune from regulation under the Commerce Clause.

ARGUMENT

I. THE WILSON AND WEBB-KENYON ACTS WITHDREW THE IMMUNITY FROM STATE REGULATION AFFORDED LIQUOR IN INTERSTATE COMMERCE, BUT DID NOT GRANT STATES POWER TO DISCRIMINATE AGAINST IMPORTED LIQUOR.

A. Before Prohibition, The Court Invalidated Both Discriminatory And Non-Discriminatory Liquor Laws Under The Commerce Clause.

By the late nineteenth century, the temperance movement was in full swing. A number of States had passed prohibition laws that outlawed the manufacture or sale of intoxicating liquors. Other States that had not yet become completely "dry" imposed substantial restrictions on the manufacture or sale of intoxicating liquors. See generally J.G. Woolley & W.E. Johnson, *Temperance Progress in the Century* 142-51, 177-78, 343-45 (1903) (discussing state liquor laws from the 1860s through the turn of the century). This Court had recognized the States' broad police powers to regulate, and even prohibit altogether, the manufacture or sale of intoxicating liquors within their borders. See *Mugler* v. *Kansas*, 123 U.S. 623, 661-62 (1887). Nonetheless, the Court repeatedly held that the Commerce Clause restricted the States' power over imported liquor.

In one line of cases, the Court declared unconstitutional state regulations that discriminated against imported liquor. In *Tiernan*, the Court considered a Texas statute that imposed an annual tax on persons who sold "spirituous, vinous, malt, and other intoxicating liquors," but exempted those persons who sold only wine or beer manufactured in Texas. 102 U.S. at 127-28. The Court explained that "commerce . . . between the States . . . is of national importance and admits and requires uniformity of regulation; [and] that the object of vesting this power in the general government was to insure

this uniformity against discriminating State legislation." *Id.* at 126. The Court determined that the Texas law was "inoperative, so far as it makes a discrimination against wines and beer imported from other States." *Id.* at 127. As the Court explained, a tax "cannot be exacted for the sale of beer and wines when [of] foreign manufacture, if not exacted from their sale when of home manufacture." *Id.*[2]

Six years later, in *Walling* v. *Michigan*, 116 U.S. 446 (1886), the Court struck down a Michigan tax that discriminated against imported liquor while exempting locally produced liquor. The Court in *Walling* summed up the governing rule:

> A discriminating tax imposed by a State operating to the disadvantage of the products of other States when introduced into the first mentioned State, is, in effect, a regulation in restraint of commerce among the States, and as such is a usurpation of the power conferred by the Constitution upon the Congress of the United States.

Id. at 455.

In a second line of cases, the Court struck down nondiscriminatory liquor regulations that, although they purported to treat imported and domestic liquor the same, nonetheless imposed direct and impermissible burdens on interstate commerce. In *Bowman*, the Court considered an Iowa law that (for all but medicinal, sacramental, or other limited purposes) prohibited the manufacture and sale of intoxicating liquors in the State. To enforce this ban, the Iowa law also prohibited common carriers from transporting

[2] Because the plaintiffs sold *liquors*, which were not subject to the discriminatory tax exemption that applied to sellers of only wines and beer, the Court affirmed the dismissal of the plaintiffs' suit seeking to enjoin enforcement of the tax. The Court explained, "There is no reason why [plaintiffs] should be exempted from the tax when selling brandies and whiskies and other alcoholic drinks . . . because they could not be thus taxed if their occupation was limited to the sale of wines and beer." *Tiernan*, 102 U.S. at 128.

liquor into Iowa from another State without prior certification that the recipient of the liquor—the "consignee"—was authorized by Iowa to sell the liquor. Although the Court did not view the restriction on transportation of imported liquor as discriminating against imported liquor, the Court nonetheless struck down the law as burdening interstate commerce. 125 U.S. at 500.

The Court began by noting that in matters involving commerce with foreign countries or between the States, Congress's "non-action . . . with respect to any particular commodity . . . is a declaration . . . that the commerce in that commodity . . . shall be free." *Id.* at 485. Although Iowa could "prohibit all domestic commerce in [intoxicating liquors] between its own inhabitants," Iowa "cannot, without the consent of Congress, express or implied, regulate commerce between its people and those of the other States of the Union in order to effect its end, however desirable such regulation might be." *Id.* at 493.

The Court expressly rejected the argument that only regulations that discriminate against the persons or products of other States run afoul of the Commerce Clause. The Court explained that nondiscriminatory regulations "directly affecting interstate commerce" likewise are prohibited. *Id.* at 496-97. The Court acknowledged the State's concern that a domestic prohibition against the manufacture and sale of intoxicating liquor could not be made effective unless it could be enforced against imported liquor. The Court, however, held that "the power to regulate or forbid the sale of a commodity, after it has been brought into the State, does not carry with it the right and power to prevent its introduction by transportation from another State." *Id.* at 500.

The Court left open whether the State could prohibit the sale of imported liquor after it arrived in the State. In his dissent, however, Justice Harlan predicted that if the Constitution conferred the right to import liquor, it also would confer the right to sell the liquor in its "original package[],"

and States would find it impossible to enforce even non-discriminatory laws against the sale of liquor. *Id.* at 514 (Harlan, J., dissenting). A person who wanted to sell liquors in Iowa "need only arrange to have them delivered to him from some point in another State, in packages of varying sizes, as may suit customers. Or, he may erect his . . . warehouse, just across the Iowa line . . . and thence . . . transport liquors into Iowa, in original packages." *Id.* at 514-15 (Harlan, J., dissenting).

The Court addressed the question left open in *Bowman* in *Leisy*, and proved Justice Harlan prescient. It held that Iowa could not prohibit the sale by a "consignee" of imported liquor in the original package. 135 U.S. at 124. The Court explained that under *Bowman*, liquor moving in interstate commerce is immune from state regulation. *Id.* at 119. It "is only after the importation is completed, and the property imported has mingled with and become a part of the general property of the State, that its regulations can act upon it." *Id.* Because such mingling does not occur until the imported property is sold, the immunity from state regulation extends through the sale of the imported liquor in its original package, meaning that the importer not only had the right to import liquor into Iowa, he also "had the right to sell it." *Id.* at 124.

Following *Leisy*, the broad immunity from state regulation afforded *imported* liquor under the Commerce Clause placed Iowa in an untenable position. Iowa was able to prohibit the manufacture and sale of *domestic* liquor, but unable to stop sales of imported liquor. To achieve their temperance goals, Iowa and other "dry" States needed authority to treat domestic and imported liquor the same.

B. The Wilson Act Partially Lifted The Immunity Afforded Imported Liquor, But Did Not Authorize Discrimination.

In response to *Leisy*, Senator Wilson of Iowa introduced, and Congress passed, the Wilson Act of 1890. By its plain

language, the Wilson Act was intended to permit States to treat imported and domestic liquor the same:

> That all fermented, distilled or other intoxicating liquors or liquids *transported into* any state or territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such state or territory be subject to the operation and effect of the laws of such state or territory, enacted in the exercise of its police powers, *to the same extent and in the same manner* as though such liquids or liquors had been produced in such state or territory, *and shall not be exempt therefrom* by reason of being introduced therein in *original packages* or otherwise.

Act of Aug. 8, 1890, ch. 728, 26 Stat. 313 (emphases added).[3]

This Court then squarely held that the Wilson Act did not empower a State to discriminate in favor of its local liquor industry. In *Scott*, the Court considered a South Carolina law that required all liquor to be sold to consumers through dispensaries run by a state liquor authority. The law discriminated against imported liquor by establishing preferences for the state authority to purchase domestic liquor, by limiting the retail price of domestic, but not imported, wines, and by imposing testing requirements on imported liquors. 165 U.S. at 92-93.

After reviewing its cases striking down liquor regulations, the Court concluded that the Wilson Act "was not intended to confer upon any State the power to discriminate injuriously against the products of other States in articles whose manufacture and use are not forbidden, and which are therefore the subjects of legitimate commerce." *Id.* at 100. To the contrary, under the Wilson Act, "equality or uniformity of treatment under state laws was intended." *Id.* The Court acknowledged that a State "may forbid entirely the

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[3] The Wilson Act has never been repealed and remains codified as amended at 27 U.S.C. § 121.

manufacture and sale of intoxicating liquors," or it "may provide equal regulations for the inspection and sale of all domestic and imported liquors and be valid." *Id.* Nevertheless, the Wilson Act did not authorize the State to "establish a system which, in effect, discriminates between interstate and domestic commerce in commodities to make and use which are admitted to be lawful." *Id.* Accordingly, the Court held that "when a State recognizes the manufacture, sale and use of intoxicating liquors as lawful, it cannot discriminate against the bringing of such articles in, and importing them from other States." *Id.* at 101.

In short, *Scott* leaves no doubt that the Wilson Act had no effect on the line of cases that held that discriminatory laws violate the Commerce Clause. Subsequent cases confirmed the point.[4] The Wilson Act thus was intended to lift the immunity afforded imported liquor under the Commerce Clause and thereby permit a State to prohibit the sale of imported liquor in its original package to the same extent the State prohibited the sale of domestic liquor. *In re Rahrer*, 140 U.S. at 564.[5]

[4] *See Vance* v. *W.A. Vandercook Co.*, 170 U.S. 438, 449-50 (1898) (explaining that although the Wilson Act "authorizes a state law to attach to an original package so as to prevent its sale, it did not contemplate and sanction the operation of a state law which injuriously discriminated against the products of other States, and which in consequence of such discrimination was not a police law in the correct sense of those words"); *Pabst Brewing Co.* v. *Crenshaw*, 198 U.S. 17, 28 (1905) (explaining that under the Wilson Act, the determination that a law is a valid police regulation "as to liquor manufactured in Missouri, *in the absence of discrimination*, is necessarily conclusive also as to the character of the law when applied to a similar article shipped from other States into Missouri after arrival at its destination, and when held for sale and consumption in that State") (emphasis added).

[5] In *In re Rahrer*, the Court rejected the argument that the Wilson Act was an unconstitutional delegation of Congressional power, explaining that Congress "simply removed an impediment to the enforcement of the state laws in respect to imported packages in their original condition, created by the absence of a specific utterance on its part." 140 U.S. at 564. Congress "imparted no power to the state not then possessed, but allowed imported property to fall at once upon arrival within the local jurisdiction." *Id.*

Nevertheless, the Court did hold that the immunity afforded goods in interstate commerce persisted with respect to imported liquor in one important respect. The Court held that the Wilson Act did not authorize a State to prohibit importation of liquor for personal use. In *Rhodes*, the Court revisited the same Iowa law that was struck down in *Bowman*. The Court recognized that the Wilson Act allowed the Iowa law to attach to imported liquor at an earlier time than the Commerce Clause would allow, and that Iowa thus could prohibit the *sale* of imported liquor. 170 U.S. at 420. The question in *Rhodes* was whether that Act permitted Iowa law to attach the moment the imported liquor reached the state line, before the completion of delivery to the consignee. *Id.* The Court construed the words "upon arrival" in the Wilson Act to mean that state law could attach only after delivery to the consignee, and not before then. *Id.* at 421. The Court noted that the Wilson Act was enacted in direct response to the holding in *Leisy* that the immunity of goods in interstate commerce precluded Iowa from prohibiting their sale. *Id.* at 423. The Wilson Act thus did not permit States to intercept shipments of liquor at the state border. *Id.*

The decision in *Rhodes* opened a substantial loophole in state prohibition laws. Although a State could prohibit the sale of imported liquor after it was delivered to the consignee, the State was powerless to stop the flow of liquor across its borders. As a result, the mail-order liquor trade into dry States flourished under the Wilson Act. See 49 Cong. Rec. 699-700 (1912) (statement of Sen. Sanders noting that the trade had grown to about 20,000,000 gallons of liquor per year under the Wilson Act). Bootleggers also boldly imported liquor, secure in the knowledge that state officials were powerless to touch the liquor until after it was delivered. Congressman Webb explained the problem to Congress:

To illustrate, sometime ago there were three packages of liquor [one barrel containing 500 half-pint bottles of liquor, one barrel containing 250 pint bottles of liquor, and a third barrel containing 140 quarts of liquor] shipped into a town in a near-by State, consigned to individuals of doubtful character, one of whom had previously been convicted of selling liquor in violation of the law of the State. . . . Owing to the character of the packages and the reputation of the consignees, the civil authorities were morally certain that these three packages of liquor were going to be used in violation of the State laws as soon as the consignees received them . . . yet not one of [the State's] officers dared touch the liquor while it remained . . . undelivered. The sacred law of interstate commerce protected these shipments of "blind-tiger" [illegal] liquor from molestation by State officers, not only while in transit, not only while they remained in the express office or depot, but also until they were actually delivered to those who intended to violate the State laws.

H.R. Rep. No. 62-1461, at 2 (1913). Congress considered a series of bills to address the limits of the Wilson Act, and in 1913, in the Webb-Kenyon Act, Congress provided the dry States with the power to intercept interstate shipments of liquor. *See* L. Rogers, *Interstate Commerce in Intoxicating Liquors Before the Webb-Kenyon Act*, 4 Va. L. Rev. 353, 365, 369-70 (1917).

C. The Webb-Kenyon Act Closed The Hole Opened By *Rhodes*, But Did Not Empower States To Discriminate.

The Webb-Kenyon Act gave States the power to block the importation of liquor for use in violation of state law. Specifically, the Act provides that the "shipment or transportation . . . of any . . . intoxicating liquor of any kind, from one State . . . into any other State . . . which . . . is intended . . . to be received, possessed, sold, or in any manner

used, either in the original package or otherwise, in violation of any law of such State . . . is hereby prohibited." Act of Mar. 1, 1913, ch. 90, 37 Stat. 699, 699-700 (codified as amended at 27 U.S.C. § 122).[6] The Webb-Kenyon Act thus closed the gap that the Wilson Act left open. And it remains closed.

In *Clark Distilling Co.*, the Court recognized that the Webb-Kenyon Act "was enacted simply to extend that which was done by the Wilson Act." 242 U.S. at 324. Of particular relevance here, the Act's "purpose was to prevent the *immunity characteristic* of interstate commerce from being used to permit the receipt of liquor through such commerce in States contrary to their laws, and thus in effect afford a means by subterfuge and indirection to set such laws at naught." *Id.* (emphasis added).

At issue in *Clark Distilling* was a West Virginia law that forbade the sale of intoxicating liquors, including for personal use. *Id.* at 316. The State sought to preclude a common

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[6] The complete text of the Webb-Kenyon Act is as follows:

> That the shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited.

Ch. 90, 37 Stat. at 699-700. The Webb-Kenyon Act was re-enacted by Congress after the Twenty-first Amendment was ratified and remains codified at 27 U.S.C. § 122. Act of Aug. 27, 1935, ch. 740, tit. II, § 202(b), 49 Stat. 877, 877-78.

carrier from shipping liquor, intended for personal use, into the State. The Court noted that under *Leisy*, the State's action would be unconstitutional as an impermissible direct burden on interstate commerce. *Id.* at 320. Under the Webb-Kenyon Act, however, the State's action was permissible; it did not matter that the State had not actually outlawed personal use of liquor, because it had outlawed shipment for personal use, which brought the state law within the scope of the Webb-Kenyon Act. *Id.* at 323-24.

The Court also held that the Webb-Kenyon Act was not an unconstitutional delegation of congressional power to the States. The Court explained that "the will which causes the prohibitions to be applicable is that of Congress, since the application of state prohibitions would cease the instant the act of Congress ceased to apply." *Id.* at 326. The Court noted that under *Leisy*, interstate commerce in liquor was immune from state regulation unless Congress provided otherwise. *Id.* at 328-29. Congress had provided otherwise in the Wilson Act, by which Congress "divest[ed]" interstate shipments of liquor of their interstate commerce character so as to "strip them of the right to be sold in the original package free from state authority." *Id.* at 330. The Webb-Kenyon Act was "but a larger degree of exertion of the identical power which was brought into play in the [Wilson Act]," which had been upheld in *In re Rahrer*, and thus the Webb-Kenyon Act likewise was constitutional." *Id.*

The Court recognized in *Clark Distilling* that the historical environment of the Webb-Kenyon Act, including the debates on its passage, demonstrates that the purpose of the Act was to close the hole left open by the Wilson Act by further removing the immunity of liquor in interstate commerce, thereby giving States the ability to interrupt liquor shipments within their borders, according to their general prohibition policies. *Id.* at 322. The history of the Webb-Kenyon Act reflects no intent to change the long-standing rule against discriminatory state regulation.

Congressman Webb explained that the Webb-Kenyon Act was intended to address the problem that "under the present law and decisions [the Wilson Act and the decision in *Rhodes*], no State can interfere with the interstate shipment of liquor until it has been actually delivered to the consignee." H.R. Rep. No. 62-1461, at 2. "[B]ecause of this present state of the law no State official is permitted to touch any interstate shipment of liquor consigned to a 'blind tiger [an illegal seller of liquor],' 'bootlegger,' or 'speak-easy' until after it has been delivered to such violator of the State law." *Id.* Congressman Webb further explained that the proposed law would permit the State officers "to seize such liquor . . . and try it upon the question of whether it was intended to be used in violation of the laws of the State, and if the jury should find that it was so intended the delivery to the consignee would be prevented and the liquor confiscated." *Id.*

Senator Kenyon of Iowa (the laws of which State were declared unconstitutional in *Bowman*, *Leisy* and *Rhodes*) likewise explained that the bill was intended to address the immunity from state regulation afforded imported liquor under the Commerce Clause, and to allow the States to treat imported liquor according to their general liquor prohibitions (and foreshadowed what was to come with Section 2 of the Twenty-first Amendment):

> I am not concerned at all with the question of whether a State in the exercise of its police power might adopt a law prohibiting the manufacture or sale of intoxicating liquors. If it does do so, it ought to be able to make that law effective. If it adopts the contrary policy, it should be permitted to make that effective. If intoxicating liquors can be freely shipped into a State which has a prohibitory law and the State government is powerless to prevent it, and the Federal Government is likewise powerless to prevent it, if this liquor is to remain in the twilight zone between Federal and State jurisdiction,

> then, indeed, it is time for some further amendment to our Constitution.

49 Cong. Rec. 761 (1912).

The effect of the Webb-Kenyon Act on the holdings in *Rhodes*, *Leisy* and *Bowman* was mentioned repeatedly in the debates.[7] Conversely, no one ever suggested at any time that the Webb-Kenyon Act would change the rule in *Scott*, *Walling* or *Tiernan*, to permit States to discriminate against in-state and out-of-state liquors. Given that *Scott* held that the Wilson Act did not authorize States to discriminate, if the Webb-Kenyon Act had been intended to change the result of *Scott*, it is inconceivable that such an intent would have been left unspoken during the extensive debates.

Senator Root raised the concern that the Act placed "no limit upon the regulation by every State" of interstate traffic in liquor. 49 Cong. Rec. 2,915 (1913). Senator Stone made it clear, however, that the Act concerned *only* the ability of States to treat imported liquor the same as domestic liquor; it "would merely put the shipper outside of Missouri or Iowa or Arkansas upon a level, that is upon terms of equality, so far as State law and regulation go, with the shipper within the State." *Id.* at 2,917. Indeed, permitting discrimination would have been inconsistent with the very purpose of the Act, as Congressman Webb explained:

> [The Act will] remove the restrictions which now bind the action of the States in their efforts to honestly enforce their lawful prohibition enactments. . . . No man outside of my State ought to have a superior right to the citizen within my State. . . . If a man has not a right in my State to sell liquor, then certainly a citizen living in the District of Columbia ought not to have a superior right to enable him to sell it inside my State.

[7] *See, e.g.*, 49 Cong. Rec. at 764-67; 49 Cong. Rec. 2,529, 2,689-90, 2,794-96, 2,807, 2,817, 2,834, 2,909-10 (1913).

Id. at 2,807. Instead of authorizing discrimination, the Webb-Kenyon Act "only stops the business of selling liquor within dry territory by persons outside that territory in violation of law." 49 Cong. Rec. at 700 (statement of Sen. Sanders).

There is no merit to Petitioners' contention that the Senate's rejection of a proposed section 2 to the Webb-Kenyon Act reflects a congressional intent to permit discrimination. To the contrary, the deletion of the language reflects nothing more than legislative expediency. Senate bill 4043 originally included, in a section 2, the language of the Wilson Act, amended to make the state law attach "upon arrival *within the boundaries* of such State or Territory and *before delivery to the consignee*." 49 Cong. Rec. at 2,687 (emphasis added). The bill that had already been approved by the House contained only language similar to that in section 1 of the Senate bill. See *id.* at 2,918, 2,920. Senator Gallinger moved to delete section 2 "in the hope and belief that it will more likely become a law than if we send the Senate bill to the House as a separate and independent measure, couched in different language from that which is employed in the House bill." *Id.* at 2,918. Section 2 thus was deleted solely to conform the Senate bill to the House bill. There was no discussion whatsoever of any need to delete the proposed Section 2 in order to permit States to engage in otherwise unconstitutional discrimination.[8]

[8] In discussing the proposed section 2, Senator Kenyon raised the concern that there was "some incongruity" between section 1, which prohibited shipments of liquor with the intent to violate the law of the State, and section 2, which "would seem to recognize the transportation of liquors and at the same time apply the police powers." 49 Cong. Rec. at 702; *see also id.* at 2,687. Senator McCumber raised the concern that section 2 could be construed as an unconstitutional delegation of congressional authority, whereas section 1 was cast in prohibitory terms and made Section 2 unnecessary. *Id.* at 702-03. Other Senators were concerned that section 2 might be used to interfere with personal use of liquor, arguing that under section 2, a State could "interrupt an interstate shipment of liquor when it arrives within its borders," regardless of whether the shipment was intended to be used in violation of state law. *Id.*

Moreover, the Court has declared that "the power to regulate which was manifested in the Wilson Act and that which was exerted in enacting the Webb-Kenyon Law are essentially identical, the one being but a larger degree of exertion of the identical power which was brought into play in the other." *Clark Distilling*, 242 U.S. at 330. The power that was manifested in the Wilson Act did not permit States to engage in discrimination. *Scott*, 165 U.S. at 100. The deletion of the proposed section 2 thus did not clear the way for discriminatory state regulations.

The manifest purpose of the Webb-Kenyon Act was to remove the immunity from state regulation that the transportation of imported liquor into dry States continued to bear after the Wilson Act, so that States could seize liquor shipments in violation of state law before they reached the consignee. In sum, there is nothing in the language, purpose or history of the Webb-Kenyon Act to suggest that it was intended to change the rule of *Scott* and empower States to discriminate by erecting protectionist barriers to imported liquor.

D. The Failure Of Prohibition Prompted Passage Of The Twenty-First Amendment But Provided No Basis To Empower States To Discriminate Against Interstate Commerce In Liquor.

The struggle of the dry States to enforce their laws against imported liquor was temporarily suspended in 1919 with the ratification of the Eighteenth Amendment. That Amendment prohibited "the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes." U.S. Const. amend. XVIII, § 1. Congress and the States had "concurrent power" to enforce the Amendment by

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at 2,688. None of the objections to proposed section 2 centered on discrimination.

"appropriate legislation." *Id.* § 2. With the passage of the Volstead Act in 1919, the country officially became "dry." National Prohibition Act, ch. 85, 41 Stat. 305 (1919).

By 1933, the country was in general agreement that the "Noble Experiment"[9] had failed. Illegal traffic in liquor was rampant. Consumption of intoxicating beverages remained popular, leading even upstanding citizens to flout the prohibition laws.[10]

Moreover, the Eighteenth Amendment had effected an unprecedented transfer of police power from the States to the federal government. Although the States had authority under the Eighteenth Amendment to pass legislation to enforce the Amendment, federal legislation was supreme and so the responsibility for enforcement fell largely on the federal government. As Senator Wagner explained in the debates surrounding repeal of the Eighteenth Amendment,

> [T]he question which has troubled the American people since the eighteenth amendment was added to the Constitution was not at all concerned with liquor. It was a question of government; *how to restore the constitutional balance of power and authority* in our Federal system which had been upset by national prohibition.

76 Cong. Rec. 4,144 (1933) (emphasis added). Section 2 of the Twenty-first Amendment restored that balance effectively by writing the relief from Commerce Clause immunity

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[9] "Our country has deliberately undertaken a great social and economic experiment, noble in motive and far-reaching in purpose." H. Hoover, *The New Day: Campaign Speeches of Herbert Hoover, 1928*, at 29 (1928), *available at* http://www.bartleby.com/66/88/28888.html.

[10] As Congressman LaGuardia explained during the repeal debates, "A change in our liquor policy is necessary, not only because of the widespread violation of the law by the criminal element but the general and universal disregard of the law by well-meaning, law-abiding people." 76 Cong. Rec. 4,514 (1933).

provided by the Wilson and Webb-Kenyon Acts into the Constitution.

II. SECTION 2 OF THE TWENTY-FIRST AMENDMENT EFFECTIVELY WROTE THE WEBB-KENYON AND WILSON ACTS INTO THE CONSTITUTION, BUT DID NOT AFFECT THE RULE AGAINST DISCRIMINATORY STATE REGULATION OF LIQUOR.

With the repeal of the Eighteenth Amendment, States once again were faced with the prospect that the immunity from state regulation afforded liquor in interstate commerce would frustrate state efforts to remain "dry" following the end of nationwide prohibition. Congress addressed this concern in Section 2 of the Twenty-first Amendment,[11] which provides: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. Const. amend. XXI, § 2. Section 2 was included not to expand the scope of the Webb-Kenyon and Wilson Acts, but to preserve them against repeal or constitutional attack.

A. The Debates Surrounding Section 2 Demonstrate That It Was Intended To Constitutionalize The Commerce Clause Framework Established Under The Wilson And Webb-Kenyon Acts.

As this Court has recognized, the "wording of § 2 . . . closely follows the Webb-Kenyon and Wilson Acts, expressing the framers' clear intention of constitutionalizing the Commerce Clause framework established under those statutes." *Craig*, 429 U.S. at 205-06 (footnote omitted). Prior to Prohibition, Congress (through the Webb-Kenyon Act) had granted dry States the ability to intercept out-of-state liquor

[11] Section 1 of the Amendment repealed the Eighteenth Amendment. U.S. Const. amend. XXI, § 1. Section 3 provided for ratification by conventions rather than by the state legislatures. *Id.* § 3.

before delivery to the consignee. Although the Webb-Kenyon Act was not repealed by the Eighteenth Amendment, *McCormick & Co.* v. *Brown*, 286 U.S. 131, 141 (1932), its constitutionality was not considered sufficiently secure to ensure that States that chose to remain dry could protect themselves against unrestrained importation of liquor. Two central themes emerge from the Senate debate on Section 2: (1) Section 2 was needed to secure the Webb-Kenyon Act against both constitutional attack and repeal; and (2) Section 2 was coincident with, and did not extend, the Webb-Kenyon Act.

The need to secure the Webb-Kenyon Act from constitutional attack and repeal was highlighted by Senator Borah. After Senator Robinson proposed to strike Section 2 from the resolution entirely, 76 Cong. Rec. 4,170 (1933), Senator Borah argued that Section 2 was necessary because absent Section 2, Congress would be "asking the dry States to rely upon the Congress of the United States to maintain indefinitely the Webb-Kenyon law." *Id.*; see also *id.* at 4,141 (statement of Sen. Blaine).

Moreover, Senator Borah argued, the Webb-Kenyon Act was "still of doubtful constitutionality and which, as it was upheld by a divided court, might very well be held unconstitutional upon a re-presentation of it." *Id.* at 4,170. As Senator Borah explained,

> The Webb-Kenyon Act was sustained by the Supreme Court of the United States by a divided court. The President of the United States—President Taft, who was afterwards Chief Justice—vetoed it on the ground that it was unconstitutional. The Attorney General of the United States rendered an opinion to the effect that it was unconstitutional. Elihu Root, when in the Senate, argued that it was unconstitutional. Mr. Justice Sutherland, who is now upon the Supreme Bench, argued before the Senate that it was unconstitutional.

Id.; see also *id.* at 4,141 (statement of Sen. Blaine). Senator Borah went on to describe the "history of the fight of the dry States to remain dry and be protected," from *Bowman* and *Leisy* through the Wilson Act and the Webb-Kenyon Act. *Id.* at 4,170-72. Section 2 was necessary, he argued, to ensure that there would never be a return to the situation that *Bowman* and *Leisy* had created. *Id.* at 4,172. After Senator Robinson withdrew his challenge to Section 2, Senator Borah responded:

> All this was sought to be remedied by the Webb-Kenyon Act, and I am very glad indeed the able Senator from Arkansas has seen fit to recognize the justice and fairness to the States of incorporating it permanently into the Constitution of the United States.

Id. Thus, as Senator Blaine, speaking on behalf of the Senate Judiciary Committee, which had proposed the Twenty-first Amendment, explained, Section 2 was included "to assure the so-called dry States against the importation of intoxicating liquor into those States." *Id.* at 4,141.

The Senate debates over Section 2 also made clear that its purpose and effect would be to lift the "immunity" from state regulation that otherwise would attach to liquor in interstate commerce, to allow imported liquor to be intercepted before it reached the "consignee" and thus "assist the States that want to be dry to remain dry." *Id.* at 4,168. For example, Senator Walsh specifically referred to the Court's ruling in *Rhodes*, which he described as holding "that under the existing Constitution the right obtains on the part of any citizen to pass his goods into another State, and they remain under the protection of the Federal Constitution until they actually reach the hands of the consignee." *Id.* at 4,219. As Senator Walsh explained, under *Rhodes*, imported liquor "is immune from any control by State statutes until it actually reaches the possession of the consignee." *Id.* He stated that he supported Section 2 because it, like the Webb-Kenyon Act, would "make the intoxicating liquor subject to the laws of the State

once it passed the State line and before it gets into the hands of the consignee as well as thereafter." *Id.* Senator Glass then echoed this point in his response, stating that under Section 2, "there can be no consignee of intoxicating liquors in a dry State." *Id.*

Conversely, the issue of what one "wet" State could do regarding competing liquor from another "wet" State simply was not under consideration. As Senator Glass explained, "Liquors may be shipped across a State in interstate commerce from one wet State to another wet State, but [Section 2] as I have drafted it prohibits the shipment of intoxicating liquors into a State whose laws prohibit the manufacture, sale, or transportation of liquors." *Id.*

Although Senators Borah and Walsh took pains to discuss the problem of the immunity afforded liquor moving in interstate commerce, which was at issue in the Court's decisions in *Bowman*, *Leisy* and *Rhodes*, there was *no* discussion by any Senator of the decisions in *Scott*, *Walling* or *Tiernan*, or of any issue involving the States' authority to discriminate against interstate commerce. As noted above, the Court previously had held in *Scott* that the Wilson Act did not permit States to discriminate against interstate commerce in liquor, and Congress made no effort to grant States that power in the Webb-Kenyon Act. Had Section 2 been intended to change the longstanding rule against discriminatory state regulation of liquor, some mention of it would have been made during the debates. However, the debates are tellingly silent on this point. In short, the history of Section 2 makes it clear that Section 2 was intended simply to preserve the Webb-Kenyon and Wilson Acts against repeal or constitutional attack; it was not intended to affect the long-standing rule against discriminatory state liquor laws.

Neither the House debate nor the State Ratification Conventions included any substantial discussion of Section

2.[12] Nonetheless, the sporadic discussions of Section 2 in the House of Representatives make clear that members of the House viewed it as nothing more than an "attempt[] to protect dry States." 76 Cong. Rec. at 4,518 (statement of Rep. Robinson). Congressman Lea, in an extension of remarks on an appropriation bill, prior to the House debates on the proposed Amendment, characterized Section 2 as "the extreme of State rights." *Id.* at 2,776. But his concern was that because Congress already had the authority to prevent interstate shipments of liquor in violation of state laws, Section 2 was unnecessary and might require the federal government to sanction "unwise" state laws. *Id.* Others in the House stressed that the Amendment returned to the States the power to choose whether to be dry, as well as the responsibility for enforcing their prohibition laws, matters that nationwide Prohibition had temporarily vested in the federal government. See *id.* at 4,523-24 (statement of Rep. McSwain). There was no suggestion that Section 2 would do anything more than enshrine the Webb-Kenyon and Wilson Acts into the Constitution.

B. Congress's Rejection Of A Proposed Section 3 To The Twenty-First Amendment Does Not Suggest That Section 2 Was Intended To Do More Than Write The Webb-Kenyon And Wilson Acts Into The Constitution.

Congress's rejection of a proposed Section 3 has no bearing on whether Section 2 overruled the longstanding prohibition against discriminatory state liquor regulations. Proposed Section 3 would have provided Congress with "'concurrent

[12] Like the Senate debate, the House debate largely focused on ratification by conventions instead of legislatures and whether the Amendment would prevent the return of the saloon. *See, e.g.*, 76 Cong. Rec. at 4,511 (Statement of Rep. Guyer); *id.* at 4,515 (Statement of Rep. Celler). The state conventions generally focused on the question of repeal and did not debate Section 2. *See generally Ratification of the Twenty-First Amendment to the Constitution of the United States* (E.S. Brown ed., 1938).

power to regulate or prohibit the sale of intoxicating liquors to be drunk on the premises where sold.'" 76 Cong. Rec. at 4,141. This provision was proposed in order to give Congress the power "to prevent the restoration of the saloon." *Id.* (statement of Sen. Blaine). This provision was the subject of fervent objections that it "does not correct the central error of national prohibition" because it "does not restore to the States responsibility for their local liquor problems [or] withdraw the Federal Government from the field of local police regulation into which it has trespassed." *Id.* at 4,144 (statement of Sen. Wagner). As Senator Wagner succinctly explained, if the proposed Section 3 were adopted, the country would "have expelled the system of national control [of liquor] through the front door of section 1 and readmitted it forthwith through the back door of section 3." *Id.* at 4,147. Section 3 thus was eliminated because it would have given the federal government too much power over local liquor matters, thus ignoring the lessons of Prohibition.

In arguing against Section 3, Senator Blaine stated that "[t]he purpose of section 2 is to restore to the States by constitutional amendment absolute control in effect over interstate commerce affecting intoxicating liquors which enter the confines of the States." *Id.* at 4,143. Considered in isolation, this statement could suggest that the scope of Section 2 was intended to relieve the States of all Commerce Clause constraints on their authority. Senator Blaine made that one statement, however, not as an explication of the scope of Section 2, but as part of an argument against the inclusion of Section 3. He stated that under Section 2, the States "are granted larger power in effect and are given greater protection, while under section 3 the proposal is to take away from the States the powers that the States would have in the absence of the eighteenth amendment." *Id.* Senator Blaine therefore argued that "section 3 is inconsistent with section 2, and the two sections are incompatible, and that section 3 ought to be taken out of the resolution." *Id.* Thus,

when viewed in context, it becomes clear that Senator Blaine's statement did not refer to the wholesale repeal of the Commerce Clause to permit discriminatory and protectionist state laws. Instead, Section 3's deletion restored to the States their *police powers* to regulate, or even prohibit, the use of liquor in saloons or elsewhere within their borders. The statement thus cannot carry the weight of a conclusion that Section 2 would permit wet States to engage in discrimination against other wet States.

* * * *

In sum, the history of the Twenty-first Amendment shows that—despite numerous decisions by this Court striking down discriminatory state laws—Congress never attempted to grant States the right to discriminate. Instead, Congress chose to enshrine the Webb-Kenyon and Wilson Acts into the Constitution to ensure that the immunity from State regulation afforded liquor in interstate commerce would never again prevent dry States restricting the flow of liquor across their borders. The history of the Amendment thus demonstrates that the Amendment had no effect on the traditional rule that the Commerce Clause prohibits economic protectionism.

III. THE DECISION IN *YOUNG'S MARKET* IS CONSISTENT WITH THE HISTORY OF THE TWENTY-FIRST AMENDMENT.

The Court has long recognized that the Twenty-first Amendment does not provide the States with unfettered authority over intoxicating liquors.[13] Nevertheless, it is useful to look closely at *State Board of Equalization* v. *Young's Market Co.*, 299 U.S. 59 (1936), both because it was the Court's first case to construe the Amendment and because, for a short period, the case was cited as support for a broad reading of the Amendment. A careful reading of *Young's Market* demonstrates it is not inconsistent with the history of the Twenty-first Amendment and presents no obstacle to a

[13] *See infra* notes 14-15.

clear holding that the Amendment did not *sub silentio* repeal the anti-discrimination principle of the Commerce Clause.

In *Young's Market*, several wholesalers challenged a California regulation that imposed a license fee of $500 for the privilege of importing beer to any place within California. The license to import did not include the privilege of selling, for which wholesalers paid a separate license fee of $50. The plaintiffs claimed that importer's license requirement discriminated against wholesalers of imported beer, in violation of the Commerce Clause. *Id.* at 60-61.

The Court, however, expressly determined that the case simply did "not present a question of discrimination prohibited by the commerce clause." *Id.* at 62. The Court explained that the California regulations imposed "no discrimination against [the plaintiffs] *qua* wholesalers" because "[t]he fee exacted for the privilege of selling, and the conditions under which a sale may be made, are the same whether the beer to be sold is imported or domestic or is both." *Id.* at 61. Any Commerce Clause concerns raised by a fee for the privilege of importing were raised "not because it resulted in discrimination, but because the fee would be a direct burden on interstate commerce," which would have raised such concerns "even if the State had exacted an equal fee for the privilege of transporting domestic beer from its place of manufacture to the wholesaler's place of business." *Id.* at 62. Because the case did not involve discrimination, the Court had no occasion to determine whether the Twenty-first Amendment overturned the Court's long line of cases striking down discriminatory state liquor laws.

The holding in *Young's Market* is consistent with the historical understanding that the Twenty-first Amendment addressed the "immunity" problem of liquor in interstate commerce by writing the Webb-Kenyon and Wilson Acts into the Constitution, but had no effect on the longstanding rule against discrimination. Any Commerce Clause concerns arose in *Young's Market* because the fee was a "direct burden

on interstate commerce." *Id.* at 62. As explained above, the Webb-Kenyon and Wilson Acts were intended to permit States to impose such "direct burdens," which previously had been prohibited by *Bowman*, *Leisy* and *Rhodes*. See, *e.g.*, *McCormick*, 286 U.S. at 142-43. Because *Young's Market* involved only a fee that imposed a "direct burden" on interstate commerce, the result in *Young's Market* thus requires no departure from the conclusion that Section 2 was intended merely to "constitutionaliz[e] the Commerce Clause framework established under those statutes." *Craig*, 429 U.S. at 205-06. Further, because all of the plaintiffs were California citizens, *Young's Market*, 299 U.S. at 60, the Court's holding went no further than to decide that the State could impose such a "direct burden" by charging local entities a fee for the "privilege of importation." It does not follow that a State may bar an out-of-state producer from entering a market that the State has determined should be open to in-state producers.

Shortly after *Young's Market* was decided, the Court, without further discussion of Section 2 or the fact that *Young's Market* did not involve discrimination, relied upon dicta in *Young's Market* to conclude that "the right of a State to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause." *Joseph S. Finch & Co.* v. *McKittrick*, 305 U.S. 395, 398 (1939); *Indianapolis Brewing Co.* v. *Liquor Control Comm'n*, 305 U.S. 391, 394 (1939); see also *Mahoney* v. *Joseph Triner Corp.*, 304 U.S. 401, 403-04 (1938) ("[S]ince the adoption of the Twenty-first Amendment, the equal protection clause is not applicable to imported intoxicating liquor."). However, the Court in *Young's Market* admitted that it did not consider the history of Section 2. 299 U.S. at 63-64. When the history of the Amendment is considered, it becomes clear that Section 2 left intact the anti-discrimination principle of the Commerce Clause, and that the holding in *Young's Market* provided no

basis for reading Section 2 more broadly than its language and evident purpose would support.

In any event, subsequent decisions of this Court have made it clear that the Twenty-first Amendment does not have the tremendous breadth that certain language in *Young's Market* and the cases that immediately followed may suggest.[14] The Twenty-first Amendment does not affect the restraints of equal protection, free speech, due process, establishment of religion or the Import-Export Clause.[15] It also should not be read to repeal the anti-discrimination component of the Commerce Clause in the area of intoxicating liquors. See *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263, 276 (1984) (holding that a discriminatory tax exemption in favor of

[14] *See Healy* v. *Beer Inst.*, 491 U.S. 324, 340-41 (1989); *id.* at 344 (Scalia, J., concurring); *324 Liquor Corp.* v. *Duffy*, 479 U.S. 335, 352 (1987) (holding that the Twenty-first Amendment did not save a state law that authorized price fixing by wholesalers); *Brown-Forman Distillers Corp.* v. *N.Y. State Liquor Auth.*, 476 U.S. 573, 584-85 (1986) (holding that the Twenty-first Amendment did not save New York's price affirmation law); *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263, 276 (1984); *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 716 (1984) (holding that state liquor regulations were preempted despite the Twenty-first Amendment); *Cal. Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 109, 114 (1980) (holding that the Twenty-first Amendment did not save California's wine pricing system from violating the Sherman Act); *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 331-32 (1964); *United States* v. *Frankfort Distilleries, Inc.*, 324 U.S. 293, 299 (1945) (explaining that Twenty-first Amendment "has not given the states plenary and exclusive power to regulate the conduct of persons doing an interstate liquor business outside their boundaries"); *Collins* v. *Yosemite Park & Curry Co.*, 304 U.S. 518, 538 (1938) (rejecting the argument that the Twenty-first Amendment gave California the right to regulate the importation from other States to, and sale of liquor within, Yosemite National Park).

[15] *See 44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484 (1996) (plurality opinion) (commercial speech); *Larkin* v. *Grendel's Den, Inc.*, 459 U.S. 116 (1982) (Establishment Clause); *Craig*, 429 U.S. at 206-07 (equal protection); *Wisconsin* v. *Constantineau*, 400 U.S. 433 (1971) (due process); *Dep't of Revenue* v. *James B. Beam Distilling Co.*, 377 U.S. 341 (1964) (Import-Export Clause).

locally-produced wines and liquors is not saved by the Twenty-first Amendment); cf. *Healy* v. *Beer Inst.*, 491 U.S. 324, 340-41 (1989) (holding that the State's price affirmation statute violated the Commerce Clause because it discriminated against brewers and shippers of imported beer, and had the effect of controlling commerce occurring outside the State); *id.* at 344 (Scalia, J., concurring) (explaining that the law's "discriminatory character eliminates the immunity afforded by the Twenty-first Amendment").

To the contrary, "[t]o draw a conclusion from [the Court's early Section 2 cases] that the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause wherever regulation of intoxicating liquors is concerned would . . . be an absurd oversimplification." *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 331-32 (1964). As the history of the Twenty-first Amendment demonstrates, the purpose of Section 2 of the Amendment was simply to write the Webb-Kenyon and Wilson Acts into the Constitution; it "was not to empower States to favor local liquor industries by erecting barriers to competition" *Bacchus Imports*, 468 U.S. at 276.

CONCLUSION

The Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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September 23, 2004

APPENDIX

Amici include the following organizations of California vintners and winegrowers:

Napa Valley Vintners: The Napa Valley Vintners is a nonprofit regional trade association with an active membership of nearly 250 Napa Valley wineries. Founded in 1943, the Napa Valley Vintners represents a tradition of dedicated vintners and grape growers who have worked and cared for this premier wine-growing region since the early 1800s. Today, the members of the Napa Valley Vintners focus on preserving Napa Valley as a viticultural and enological treasure, producing the highest quality wines, and promoting the Napa Valley Appellation both nationally and internationally as one of the finest wine-growing regions in the world.

Sonoma County Wineries Association: The Sonoma County Wineries Association is a trade association committed to promoting the wines of the fourteen wine-growing appellations in Sonoma County, California. Franciscan mission fathers laid the foundation for the Sonoma County wine industry with the planting of mission vineyards in 1823. Today, in Sonoma County, there are more than 190 wineries, over half less than 20 years old. The Sonoma County Wineries Association membership includes 170 Sonoma County wineries and vineyards, including small, family-owned wineries that, as they did over 150 years ago, continue to exist comfortably alongside larger entities, each producing premium wine in its own unique style.

Monterey County Vintners and Growers Association: The Monterey County Vintners and Growers Association (MCVGA) was formed in 1973 to establish Monterey County as a premium wine grape-growing region. Since that time, Monterey Wine Country has grown to over seventy-five vintners and growers and boasts nearly 40,000 acres of

grapes, making it one of the largest premium wine grape-growing regions in California. The Monterey County Vintners and Growers Association brings together the talents and resources of grape growers and wine producers to promote and support their leadership in the art, the science and the business of wine.

El Dorado Winery Association: The El Dorado Winery Association is a trade association that is comprised of nineteen, small, family wineries in El Dorado County, California. Wines have been produced in El Dorado County since the early 1850s. Today, the members of the El Dorado Winery Association make fine wine in small lots, producing from just over one thousand cases of wine per year to about thirty thousand cases per year. The members of the El Dorado Winery Association are dedicated to developing and promoting the El Dorado Appellation.

Amador Vintners' Association: The Amador Vintners' Association is a regional trade association of twenty-five wineries from Amador County, California. Located in the western foothills of the Sierra Nevada mountain range in central California, Amador County boasts 2,700 acres of wine grapes—a high percentage of which are farmed organically—and twenty-five wineries. Wines have been produced in Amador County since the Gold Rush of the 1850s, and some of the vineyards planted during that era survive to this day. The twenty-five member wineries of the Amador County Vintners Association are primarily small, family-owned operations whose proprietors make and sell their own wines.

Temecula Valley Winegrowers Association: The Temecula Valley Winegrowers Association is a regional trade organization of wineries, winegrowers, and related businesses in and around California's Temecula Valley. Mission vineyards were established in Temecula in 1820, and today, the wineries and vineyards of Temecula Valley produce some of the finest wines and winegrapes in the world. The seventy-five members of the Temecula Valley Winegrowers

Association are dedicated to promoting the making and growing of quality wine and winegrapes in the Temecula Appellation.

Santa Cruz Mountains Winegrowers' Association: The Santa Cruz Mountains Winegrowers' Association is a regional organization of wineries, vineyards, and businesses in the Santa Cruz Mountains of California. The Santa Cruz Mountains has been recognized as a premium wine producing region since the late 1800's. Although few of those original wineries survived Prohibition, today, there are over sixty, small, family-owned wineries in this unique grape-growing region. The more than 180 members of the Santa Cruz Mountains Winegrowers' Association focus on producing the highest quality wines and promoting the Santa Cruz Mountains Viticultural Appellation.

(13) (11) (10)

Nos. 03-1116, 03-1120, 03-1274

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JENNIFER M. GRANHOLM, Governor, *et al.*,
Petitioners,

v.

ELEANOR HEALD, *et al.*,
Respondents.

MICHIGAN BEER & WINE WHOLESALERS ASSOCIATION,
Petitioner,

v.

ELEANOR HEALD, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE NATIONAL ALCOHOL BEVERAGE CONTROL ASSOCIATION AND THE NATIONAL CONFERENCE OF STATE LIQUOR ADMINISTRATORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does a State's regulatory scheme that permits in-state wineries directly to ship alcohol to consumers but restricts the ability of out-of-state wineries to do so violate the dormant Commerce Clause in light of Sec. 2 of the 21st Amendment?

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BRIEF OF THE NATIONAL ALCOHOL BEVERAGE CONTROL ASSOCIATION AND THE NATIONAL CONFERENCE OF STATE LIQUOR ADMINISTRATORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Rule 37 of the Rules of this Court, the National Alcohol Beverage Control Association, Inc. (NABCA) and the National Conference of State Liquor Administrators (NCSLA), by their attorney, file this brief as *amici curiae* in

support of the position of the Petitioners and respectfully urge this Court to overturn the judgment of the United States Court of Appeals for the Sixth Circuit in *Heald v. Engler*, 342 F.3d 517 (6th Cir. 2003).[1] This brief is filed with the consent of the parties, evidence of which is submitted with this brief.

INTEREST OF THE *AMICI CURIAE*

NABCA is a Wyoming non-profit corporation whose members are the 19 jurisdictions[2] that directly control the distribution and sale of alcohol beverages through the operation of state-owned wholesale and, in some cases, retail outlets; these jurisdictions also regulate the sale of alcohol beverages by private outlets such as package stores, restaurants and taverns. NCSLA is an unincorporated membership association whose members are the remaining jurisdictions that simply regulate private sellers of alcohol beverages. Some jurisdictions are members of both organizations. Taken together, NABCA and NCSLA represent the state, and, in some cases, local government agencies charged with regulating the distribution and sale of alcohol

[1] Counsel of record for the *amici curiae* was the sole author of this brief. No person or organization other than the *amici curiae* has made a monetary contribution to the preparation or submission of this brief.

[2] NABCA's members include the Alabama Alcoholic Beverage Control Board, Idaho State Liquor Dispensary, Iowa Alcoholic Beverages Division, Maine State Liquor & Lottery Commission, Michigan Liquor Control Commission, Mississippi State Tax Commission, Montana Department of Revenue Liquor Division, Montgomery County (MD) Department of Liquor Control, New Hampshire State Liquor Commission, North Carolina Alcoholic Beverage Control Commission, North Carolina Association of ABC Boards, Ohio Division of Liquor Control, Oregon Liquor Control Commission, Pennsylvania Liquor Control Board, Utah Department of Alcoholic Beverage Control, Vermont Department of Liquor Control, Virginia Alcoholic Beverage Control Board, Washington State Liquor Control Board, West Virginia Alcoholic Beverage Control Administration and Wyoming Department of Revenue Liquor Division.

beverages in all 50 states. Several of these agencies are or have been defendants in litigation similar to the instant case and all would have their ability to regulate alcohol beverages significantly impacted by the decision in this matter.

SUMMARY OF ARGUMENT

The plain language as well as the judicial interpretation of the Twenty-First Amendment clearly supports the validity of the state laws that are under attack herein. Further, a state's regulation of the interstate shipment of alcohol beverages directly to its consumers is an inherent part of a state's structure of its alcohol beverage industry, a function that clearly falls within the so-called "core" powers of the Twenty-First Amendment and that also acts to immunize a state's action from Commerce Clause scrutiny.

Alternatively, even if one accepts the premise that a state's regulation is precluded by the Commerce Clause, one must consider the impact of the Webb-Kenyon Act, a federal statute that both pre-dates and post-dates the adoption of the Twenty-First Amendment and that serves to strip alcohol beverages of their normal interstate commerce protection, thus allowing a state to impose the kind of regulation on the importation of alcohol beverages that is at issue here.

ARGUMENT

I. MICHIGAN'S APPROACH TO REGULATION IS PERMISSABLE UNDER THE PLAIN LANGUAGE AND JUDICIAL INTERPRETATION OF THE TWENTY-FIRST AMENDMENT

Drink is in itself a creature of God, and to be received with thankfulness.

Increase Mather, 1673

The thing has arrived to such a height, that we are actually threatened with becoming a nation of drunkards.

Greene and Delaware Moral Society, 1815

The production, sale and regulation of alcohol beverages have long been a source of controversy as well a fertile area for litigation within the United States. In the early days of the nation, the new federal government sparked an agrarian uprising—known as the "Whiskey Rebellion"—when it sought to impose, for the first time, a federal excise tax on distilled spirits, in part to fund the debt of the Revolutionary War.

While the federal government thus staked a "claim" to its right to tax alcohol beverages, it generally did not seek to impose other restrictions on its production and distribution. That responsibility fell to the individual states, which sought to exercise control over the product's distribution by licensing sellers, an action that was upheld by this Court in *The License Cases*, 46 U.S. 5 How. 504 (1847). It should be noted that, even today, the federal government's regulation of alcohol beverages outside of the tax area is limited to scrutiny of certain trade practices. The "imposition" of a national minimum drinking age was not done directly, but rather as an exercise of Congress' spending power. In fact, this Court questioned whether Congress even possessed the power to directly impose a national minimum drinking age. *South Dakota v. Dole*, 483 U.S. 203, 212 (1987).

A strong anti-alcohol movement emerged in the latter half of the nineteenth century. Several states attempted to legislate a totally "dry" environment in which the sale of alcohol was prohibited, the National Prohibition Party was formed in an effort to impact federal elections, and such groups as the Women's Christian Temperance Union and the Anti-Saloon League were born out of a concern about the adverse effect that excessive consumption of alcohol beverages was having on the country's moral fabric.

Some states opted for virtually unrestricted commerce in alcohol beverages while others opted to be "dry," that is, they prohibited virtually all traffic in alcohol beverages. Still others adopted "local option" statutes, giving cities, towns and municipalities the authority to determine whether to allow the sale and distribution of alcohol beverages.

Although Congress generally adopted a "hands-off" policy with regard to alcohol beverage regulation, except for federal taxation of the product, state regulation of trade in alcohol beverages soon ran afoul of the Constitution's grant to Congress—and Congress alone—of the authority to regulate commerce among the states. U.S.Const. Art. I., Sec. 8, cl. 3. Expressly overruling a 50-year-old precedent, this Court declared invalid an Iowa law regulating the sale of alcohol beverages which had been shipped from outside the state. *Leisy v. Hardin*, 135 U.S. 100 (1890).

Reacting to *Leisy*, Congress passed the so-called "Original Packages Act," also known as the Wilson Act, which declared that, upon arrival into a state, alcohol beverages became subject to the regulatory scheme of the state, in the same manner as alcohol beverages produced within the state. Act of August 8, 1890, c. 728, 26 Stat. 313 (current version at 27 U.S.C. §121).

Passage of the Wilson Act, however, did not totally clarify the ability of states to regulate trade in alcohol beverages within their borders. Although the constitutionality of the Wilson Act was upheld, *In re Rahrer*, 140 U.S. 545 (1891), in *Rhodes v. Iowa*, 170 U.S. 412 (1898), this Court held that, although alcohol beverage products lose their character as items of interstate commerce *after* their delivery into a state, the Wilson Act did not authorize the laws of a state to be applied to such merchandise while in transit and prior to delivery to a consignee within the state.

Similarly, in *Vance v. W.A. Vandercook Company*, 170 U.S. 438 (1898), this Court declared that the Wilson Act did not recognize the right of a state to prevent an individual from ordering alcohol beverages from outside the state for his own consumption.

Congress moved to close this "loophole," but not until 1913 did it succeed in passing, over the veto of President William Howard Taft, what is now commonly referred to as the Webb-Kenyon Act. Act of Mar. 1, 1913, c. 90, 37 Stat. 699 (current version at §27 U.S.C. 122). The title of the Act—"An Act divesting intoxicating liquors of their interstate character in certain cases"—is instructive in determining the motivation for its adoption. Rep. Clayton, Chairman of the House Judiciary Committee, which extensively debated the bill prior to its consideration by the full House of Representatives, clearly explained its purpose when he declared

> The purpose (of the bill) is to take the protecting arm of the Federal Government, by virtue of the interstate commerce clause of the Constitution, from around the illicit dealers in liquors, and is to allow the States which have passed police regulations restricting or forbidding the sale of liquor to better enforce those regulations.

49 Cong. Rec. H2864 (daily ed. February 8, 1913).

This Court upheld the validity of the Act, holding that there was no reason to state that because Congress had a power to forbid movement of a product in interstate commerce, it did not also have the authority to establish a regulation making it impossible for one state to violate the prohibition of the law of another state in interstate commerce. *Clark Distilling Co. v. Western Maryland Ry. Co.*, 242 U.S. 311 (1917). That analysis is still good law today.

This Commerce Clause exception was quickly swallowed up by the national experiment known as Prohibition when the Eighteenth Amendment was declared to have been ratified by

the requisite number of states on January 29, 1919. Section 1 of the Eighteenth Amendment not only banned the manufacture, sale or transportation of alcohol beverages within a state, but it also prohibited the importation into any state of alcohol beverages originating in another state.

When it became apparent that Prohibition was a failure, Congress moved to undo its Constitutional underpinning by adopting the Twenty-First Amendment; ratification was completed on December 5, 1933. Congress could have completed its effort merely by adoption of Section 1 alone. That would have repealed the ban on activity within a state, as well as the prohibition on importation of alcohol beverages into any state. However, Congress chose to add Section 2, which plainly declares

> The transportation or importation into any State, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

To underscore the Congressional statement on the impact of the Amendment, the Webb-Kenyon Act was subsequently re-enacted without change 1935. Act of Aug. 27, 1935, c. 740 §202(b), 49 Stat. 877 (current version at 27 U.S.C. §122).

These two affirmative statements of Congressional intent make it crystal clear that Congress meant to create an exception to the normal rules of interstate commerce regulation in the case of alcohol beverages. As the Constitution's sole regulator of interstate commerce, Congress clearly has the power to authorize state regulations that burden or discriminate against interstate commerce, *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408 (1946). Using its authority, Congress could have restricted a state's authority to ban or regulate imports only in situations where the state treated in-state products in the same manner, but it did not. Nowhere in the plain language of the Twenty-First Amendment is there a hint that, for the purpose of regulating

transportation or importation into any state, a state must treat out-of-state alcohol beverages in the same manner in which it treats in-state alcohol beverages.

This Court promptly recognized the impact of the Twenty-First Amendment, noting that it "sanctions the right of a state to legislate concerning intoxicating liquors brought from without, unfettered by the Commerce Clause." *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138 (1939). This Court has continued to recognize that the Twenty-First Amendment "primarily created an exception to the normal operation of the Commerce Clause," *Craig v. Boren*, 429 U.S. 190, 206 (1976), and that the resultant authority of the state under the Amendment over importation of alcohol beverages "is transparently clear." *Id.* at 207.

Even as this Court later appeared to suggest that the grant of authority under the Twenty-First Amendment must be balanced with Congress' power under the Commerce Clause under certain conditions, the scope of those conditions has been made abundantly clear:

> The Twenty-First Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system. Although States retain substantial discretion to establish other liquor regulations, those controls may be subject to the federal commerce power in appropriate situations.

California Retail Liquor Dealers Association v. Midcal Aluminum, 445 U.S. 97, 110 (1980)

In its most recent review of the Twenty-First Amendment, this Court noted that Section 2 delegated to the states the power "to prohibit commerce in" alcohol beverages and further stated that state "regulatory power over this segment of commerce is therefore largely 'unfettered by the Commerce Clause.'" *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 515 (1996), citing *Ziffrin*, supra.

This Court has thus clearly demarcated the scope of the Twenty-First Amendment: states have "virtually complete control" over the importation of alcohol beverages. As to "other regulations," however, the state's authority must be balanced against the Commerce Clause.

In holding the Michigan statute invalid because of a conflict with the Commerce Clause, the court below misapplied this long-standing and clear interpretation of the Twenty-First Amendment. The lower court contended that the "proper approach" in this case was to apply traditional dormant Commerce Clause analysis and, if the state's approach to regulation was found to be unconstitutional, to determine whether the unconstitutionality was somehow "saved" by a Twenty-First Amendment analysis.

The *amici curiae* believe that this approach is erroneous; the lower court should have first looked at the plain language of the Twenty-First Amendment to determine its applicability to the situation at hand before going on to review other sections of the Constitution, not the other way around.

Further, the court below also erroneously relied on *Bacchus Imports v. Dias*, 468 U.S. 263 (1984) to support its reasoning. That case involved a state's regulation of alcohol beverages—in this case, taxation—once the beverages had arrived into the state. The state did not seek to justify the tax on the ground that it was designed to promote temperance or to carry out any other purpose of the Amendment; in fact, the state acknowledged that the purpose of the discriminatory taxation scheme was to promote a local industry *Id.* at 276. Indeed, the Twenty-First Amendment claim in that case was not even raised by the state until Supreme Court consideration.

Thus, based on the plain language and judicial interpretation of the Twenty-First Amendment, the opinion of the court below should be reversed and the validity of Michigan's statute upheld. By the same reasoning, New York and other states should be permitted to regulate imports of alcohol beverages in the manner they see fit, even if that regulation involves differential treatment of in-state products.

II. MICHIGAN'S STATUTE CLEARLY FALLS WITHIN THE "CORE POWERS" OF THE TWENTY-FIRST AMENDMENT THAT HAVE BEEN RESERVED TO THE STATES

Even if one takes the position that a balancing of the Twenty-First Amendment and the Commerce Clause should be considered, it is readily apparent that the court below erred in its construction of a state's "core powers" under the Amendment that are to be given precedence over the Commerce Clause.

In its brief discussion of "core powers," the court below erroneously dismissed virtually out of hand the notion that Michigan's direct shipment ban promotes "temperance, ensuring orderly market conditions, and raising revenue" which are the state's "core powers" under the Twenty-First Amendment that this Court has long recognized. *North Dakota v. United States*, 495 U.S. 423, 432 (1990).

Other courts have also shed light on a state's "core powers." For instance, mere regulation of the sale of alcohol beverages is not sufficient to overcome a Commerce Clause challenge; a state's regulation "must effect the structure of the state liquor distribution system." *Pete's Brewing Co. et al. v. Whitehead*, 19 F.Supp.2d 1004, 1020 (W.D.Mo. 1998).

There can be no question that Michigan's decision to prohibit the direct shipment of alcohol beverages from a location outside of the state to consumers within the state is

an integral part of the structure of the liquor distribution system that the state has chosen to implement. The sale of alcohol beverages does not take place in a free and unregulated market. Buyers of alcohol beverages must be twenty-one years of age or older. Sellers are limited to those who have been licensed by the state after an exhaustive check of their background. Many licensed sellers, especially those at the production or wholesale level, are frequently required to remit excise taxes to the state and licensed retailers are required to collect and remit applicable sales taxes when the product is transferred to the ultimate consumer. Many jurisdictions (e.g., cities and counties) have opted to be totally "dry," prohibiting the sale of alcohol beverages altogether.

To strike down a state's statute as an impermissible burden on interstate commerce outside of the state's "core powers" under the Twenty-First Amendment would undermine a state's ability to structure any kind of distribution system, and lead to a totally unregulated market in alcohol beverages. *Every* regulation of in-state producers and sellers would have to be applied equally, and could lead to virtually unrestricted trade in alcohol beverages, not only to consumers, but to in-state retailers as well. If out-of-state sellers are permitted to ship into a state directly to the state's consumers, the state will lack the ability to effectively enforce its laws governing age of purchaser, background of sellers and collection of revenue, all of which are central to the system of distributing and selling alcohol beverages.

Michigan has not rendered it impossible for out-of-state vendors to reach its consumers. It has merely structured a system—and done so within the parameters permitted under the Twenty-First Amendment—that requires licensing and tax collection. Out-of-state vendors who wish to reach Michigan consumers may do so within the regime laid out by the state.

While some may believe that there is a less intrusive way for a state to regulate the importation of alcohol beverages

into its borders, the Twenty-First Amendment clearly gives the state legislature, and not the courts, the power to determine what kind, if any, importation to allow, and under what circumstances. This Court should not now undermine the plain meaning of the Twenty-First Amendment and its own long-standing interpretations of that Constitutional provision by the judicial insertion of conditions that have not heretofore been recognized.

III. EVEN IF ONE ASSUMES THAT THE COMMERCE CLAUSE "TRUMPS" THE POWER ACCORDED TO THE STATE UNDER THE TWENTY-FIRST AMENDMENT, CONGRESS HAS UTILIZED ITS COMMERCE CLAUSE AUTHORITY TO DELEGATE CONTROL TO THE STATES

There is yet another reason, however, why Michigan's regulatory approach must be permitted to stand. Even if one accepts the reasoning of the court below, which the *amici curiae* believe is erroneous, one is left with Congress' utilization of its interstate commerce power in the Webb-Kenyon Act.

As has been indicated previously, that Act both pre-dates and post-dates adoption of the Twenty-First Amendment. Its purpose was unmistakably clear: "to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in states contrary to their laws." *Clark Distilling Co.*, supra.

Placed in the context of the earlier Wilson Act, the Webb-Kenyon Act represents a "further surrender to the states of the constitutional power of Congress to regulate interstate commerce in intoxicating liquors." *Dugan v. Bridges*, 161 F.Supp. 694, 704 (D.N.H.), appeal dismissed 300 U.S. 684 (1936). The Act shows an intent to give the states an "entirely free hand" in regulating the importation of alcohol beverages,

Id., and there appears to be no prohibition against discrimination between liquors produced within the state and those produced outside the state. Put another way, the Act sanctions differential treatment of sellers, depending on their location.

The re-enactment of the Webb-Kenyon Act in 1935, subsequent to the adoption and implementation of the Twenty-First Amendment, underscores the principle that the Amendment does not withdraw from the states the power surrendered to them by the passage of the Act, regardless of whether one views the Act as a power abdicated that previously had been exercised by Congress, or as one having always been retained or reserved under the police powers of a state. *Id.* at 707.

The chronological timing of Congress' action in re-enacting the Act subsequent to the Twenty-First Amendment and its clear language indicate that, notwithstanding any other Commerce Clause analysis, Congress *did* intend to allow the states a free hand to regulate, or even prohibit, the interstate shipment of alcohol beverages into their borders.

To hold otherwise would render the Act and more than a century of Congressional pronouncements on the power of states a nullity.

While a balancing test against the Commerce Clause may be appropriate in certain instances of state enactments arguably supported by the power bestowed under the Twenty-First Amendment—a balancing test that, as stated, the *amici* do not believe is appropriate here—there can be no balancing test in construing what, in effect, is the grant of authority to the states under the Webb-Kenyon Act. Congress clearly determined to cede a portion of the federal government's interstate commerce authority to the states, and whether one agrees with the manner in which the state has exercised its authority or not, the clear result must be a deferral to

state action in the area of regulating importation of alcohol beverages.

There is nothing more basic to the structure of a state's alcohol beverage distribution system than the ability to determine under what conditions the product may be brought into the state. Alcohol beverages are one of a handful of products (tobacco and firearms being two others) that the government has determined warrant special treatment by means of controlling who may sell and who may purchase the product. There is not now, nor has there been for more than 150 years a "free" market in alcohol beverage distribution and sale. To disallow Michigan's (and other states') lawful attempt to control and regulate the distribution of this product would mean that virtually no importation regulation would be allowed to stand, leading to the uncontrolled and uncontrollable distribution of alcohol beverages.

This case is not about whether direct shipping of alcohol beverages to consumers should be allowed or prohibited. It is about the right of each state, acting pursuant to the Twenty-First Amendment, to decide for itself how it wishes to deal with its alcohol beverage distribution system.

Alcohol beverages should not be turned into the functional equivalent of polo shirts or blue jeans merely because a trier of fact believes there is a better way to regulate the product's flow.

CONCLUSION

For the reasons set forth herein, the decision of the Sixth Circuit should be overturned and the case remanded for further proceedings not inconsistent with the decision herein. The decision of the Second Circuit in a companion case should be upheld.

Respectfully submitted,

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Nos. 03-1116 & 03-1120

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IN THE

Supreme Court of the United States

JENNIFER M. GRANHOLM, *et al.*,
Petitioners,

v.

ELEANOR HEALD, *et al.*,
Respondents.

MICHIGAN BEER & WINE WHOLESALERS ASSOCIATION,
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Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Sixth Circuit

BRIEF OF NATIONAL BEER WHOLESALERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does a State's regulatory scheme that permits in-state wineries directly to ship alcohol to consumers but restricts the ability of out-of-state wineries to do so violate the dormant Commerce Clause in light of Section 2 of the Twenty-first Amendment?

PARTIES TO THE PROCEEDINGS

Petitioners, Defendant-Appelles below, are State of Michigan officials including the Governor, the Michigan Attorney General, and the Chair of the Liquor Control Commission (hereafter collectively referred to as "Michigan" or the "State"). The current holders of those offices have been substituted as parties for the former office holders pursuant to Sup. Ct. R. 35.3.

Petitioner, intervening Defendant-Appelle below, is the Michigan Beer & Wine Wholesalers Association ("MB&WWA"), a trade association of the Michigan beer and wine wholesalers that intervened as a defendant in the district court.

Respondents, Plaintiffs-Appellants below, include Eleanor Heald, Ray Heald, John Arundel, Karen Brown, Richard Brown, Bonnie McMinn, Gregory Stein, Michelle Morlan, William Horwath, Margaret Christina, Robert Christina, Trisha Hopkins, Jim Hopkins and Domaine Alfred, Inc. The thirteen individual parties are Michigan residents who are wine connoisseurs, wine journalists, and wine collectors. Respondent Domaine Alfred, Inc. is a California winery.

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On Writs of Certiorari to the United States Courts of Appeals for the Sixth Circuit

BRIEF OF NATIONAL BEER WHOLESALERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

Since 1938, the National Beer Wholesalers Association ("NBWA") has served as the national membership organization of the beer wholesaling industry representing over 2,200 licensed beer wholesalers.[1] Its members reside in all

[1] This *amicus curiae* brief filed in support of the Petitioners was funded solely by the National Beer Wholesalers Association and authored solely

fifty states. In 1997, U.S. beer wholesaler direct sales reached $30.5 Billion Dollars. Beer wholesalers employed 92,860 individuals and paid $3.4 Billion Dollars in wages. The total economic activity directly generated by beer wholesalers was $8.2 Billion Dollars. The total state and local taxes paid directly by beer wholesalers was $2.4 Billion Dollars. *See Beer Wholesalers: Their Role and Economic Performance*, at 46-47 (3d ed. 1999).

The economic activity of distributing beer stimulates other activity in the economy. Every dollar spent by wholesalers to buy such things as vehicles, equipment, computers and other goods and services represents income to other industries. Taking into account the "multiplier effect", the total direct and indirect economic contribution of beer wholesalers nationwide in 1997 was as follows: 368,010 jobs created, $10.2 Billion Dollars in wages paid, $28.4 Billion Dollars in total economic activity created, and $4.0 Billion Dollars in state and local taxes paid. *Id.* at 47. Obviously, the economic contribution of beer wholesalers is even greater today.

This case implicates the essential interests of NBWA and its members. The Sixth Circuit decision in *Heald v. Engler*, 342 F.3d 517 (6th Cir. 2003) threatens to dismantle complex state regulatory systems governing alcoholic beverages that have worked remarkably well for over seventy (70) years. Through these delicately balanced and historically tested regulatory schemes, states have addressed several fundamental interests: preventing illegal sales to minors, inhibiting overly aggressive marketing and consumption, collecting taxes, creating orderly distribution and importation systems, and preventing a recurrence of the problems that led to the enactment of National Prohibition.

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by counsel for the National Beer Wholesalers Association. This brief is filed with the written consent of all parties, evidence of which is submitted with this brief.

Specifically, the *Heald* decision puts at risk the requirement that all imported alcoholic beverages be delivered to an in-state licensee, thereby assuring effective regulation. Ordinarily, wholesalers are the in-state licensed entities through which imported alcoholic beverages must pass. Wholesalers pay excise taxes on imported product and retain records of their sales to retailers, thereby creating a transparent and accountable distribution system. They have invested large sums in creating these distribution systems in a highly regulated environment. These investments are jeopardized if the regulatory playing field is tipped against in-state licensees and out-of-state entities are permitted to ship directly to consumers.

SUMMARY OF ARGUMENT

Intoxicating liquor is a unique product in American law. The detrimental impacts on individuals, families, and society as a whole that result from intemperate or underage consumption of intoxicating liquors are dramatically different from those related to the use of other products, whether measured by scale, severity, nature or remediability. As a consequence, government has attempted to mitigate these impacts through regulation. Indeed, intoxicating liquor has always been, and remains, one of the most heavily regulated products in the country. Localities and states have enacted a variety of restrictions on the manufacture, distribution and sale of intoxicating liquor. No other product has been the subject of one, let alone two, Constitutional Amendments: the first was the Eighteenth Amendment, which established National Prohibition and the second was the Twenty-first Amendment, which returned primary responsibility for alcohol regulation to the states. Then, as now, community norms and standards across the country differ widely regarding intoxicating liquors. This fact underscores the soundness of the Constitutional decision to rest regulatory authority primarily at the state and local level.

Since passage of the Twenty-first Amendment over seventy (70) years ago, this Court consistently has reaffirmed the right of states to control and regulate the production, shipment and sale of intoxicants within their borders. A review of the history of the Twenty-first Amendment, the Webb-Kenyon Act, and cases arising thereunder demonstrates that states are at liberty to regulate intoxicating liquor free from Commerce Clause limitations. In *Heald*, Respondents' entire constitutional challenge rests upon the argument that Michigan's different treatment of wineries with an in-state presence (which are subject to the State's regulatory powers) from those without such a presence (which are *not* subject to the state's regulatory powers) violates the dormant Commerce Clause. This challenge simply is not cognizable.

The *Heald* decision destroyed a keystone of the State's regulatory power: the right under the Twenty-first Amendment to control the importation of intoxicating liquor into the State and insist on importation and distribution through licensed entities with a physical presence in the State. Without apparent regard to the consequences of its decision, the *Heald* case made a Trojan Horse of one minor Michigan statutory provision which permits in-state wineries (which are subject to the licensing authority of the State), but not out-of-state wineries (which are outside the regulatory reach of the state), to ship direct to consumers, and thereby toppled a comprehensive three-tier system governing the distribution of intoxicating liquor.

Furthermore, the broad ruling not only undermines effective regulation, but also discriminates against licensed in-state wholesalers and retailers, since they, unlike unlicensed out-of-state suppliers, are subject to enforceable regulations and taxation. In doing so, the Sixth Circuit decision ignored (or at least rendered irrelevant) the Twenty-first Amendment (which represents a national consensus reached by the

American people just seventy years ago), a long line of decisions by this Court recognizing a state's fundamental and constitutional right to regulate alcoholic beverages, and an Act of Congress (the Webb-Kenyon Act) which explicitly grants states that right.

ARGUMENT

I. LIQUOR REGULATION PRIOR TO PROHIBITION.

Intoxicating liquor never has been treated like other products either by society or government. Over the course of our nation's history, public tolerance and the degree of regulatory control has vacillated between a view of alcohol as a mere article of commerce and a view of alcohol as a dangerous intoxicating beverage. The nineteenth century saw several waves of temperance activity with both social and political components. This activity led to greater regulation of intoxicating liquors. At times and in some parts of the country, the manufacture and sale of intoxicating liquor was banned, public dispensaries were established, and sales outlets were licensed, restricted and carefully regulated.

The evolution of our commercial infrastructure has led to legal challenges to existing liquor regulatory regimes. In the late nineteenth century, improvements in transportation, in particular the growth of railroads, and the concomitant expansive development of the dormant Commerce Clause doctrine gave rise to lawsuits which contested the constitutionality of state statutes and ultimately undermined the effectiveness of state regulatory efforts. The Court in *Bowman* and *Leisy* narrowly circumscribed the power of states to regulate the importation of intoxicating liquors. *See Bowman v. Chicago & NW Railway Co.*, 125 U.S. 465 (1888) (the Court struck down a state law which restricted the importation of intoxicating liquor to those possessing a permit); *Leisy v. Hardin*, 135 U.S. 100 (1890) (the Court held

that intoxicating liquor shipped into the state remained an article of "interstate commerce", immune from state regulation, as long as it remained in its original package). *Bowman* and *Leisy* represent a short-lived, jurisprudential detour from the subsequently established constitutional principle that intoxicating liquor is unlike other products and is not subject to dormant Commerce Clause analysis.

The crippling of state regulation by the Court in the *Bowman* and *Leisy* decisions provoked a congressional response, ending "dormacy" of federal regulations and permitting state regulation of importation. Congress passed the Wilson Act, 27 U.S.C. § 121 (1890), declaring that, upon arrival in the state, the sale, distribution and transportation of intoxicating liquor was subject to state regulation. In *Rhodes v. Iowa*, 170 U.S. 412 (1898), however, the Court narrowly construed the Wilson Act and concluded that the dormant Commerce Clause prohibited state regulation of direct shipments to in-state consumers by out-of-state distributors. As a result, railway express began to function as retail outlets. Congress responded with the passage of the Webb-Kenyon Act, 29 U.S.C. § 122 (1913), which gave the states power to prohibit the sale, distribution, transportation or importation of intoxicating liquor into the state in violation of its laws.[2] There could not have been a clearer expression by Congress of its intent to ensure that the state be the focus of control regarding intoxicating liquor.[3] The risk of discriminatory

[2] In vetoing the Bill, President Taft described it as permitting "the states to exercise their old authority, before they became states, to interfere with commerce between them and their neighbors." The veto was swiftly overridden. *See* 49 Cong. Rec. 4292.

[3] As originally reported by the Senate Committee, the Webb-Kenyon Act (Senate Bill 4043) included as Section 2 the explicitly anti-discriminatory language of the Wilson Act (i.e. states may not discriminate against out-of-state suppliers, importers or wholesalers with regard to the regulation of intoxicating liquor). 49 Cong. Rec. 2687. This Section was eliminated from the final Bill. Clearly, this evidences the intent of Congress to grant states the power to regulate intoxicating liquors even where it may result in the possibility of differential treatment between in-state and out-of-state vendors. *See Dugan v. Bridges*, 16 F. Supp. 694 (D. N.H. 1936) ("[The Webb-Kenyon] Act in its original form contained the same language that was used in the Wilson Act to prevent discrimination against out-of-state production. *See* 49 Cong. Rec. p. 1687. In the act as finally posed the restrictive language does not appear. Its omission seems important. It shows intent to give the states an entirely free hand in regulating the importation and transportation of liquor.")

legislation was outweighed by the desire to insure effective state regulation. The constitutionality of the Webb-Kenyon Act was upheld in 1917 in *Clark Distilling Co. v. Western Maryland Ry Co.*, 242 U.S. 311 (1917).

II. PASSAGE OF THE TWENTY-FIRST AMENDMENT.

In response to a national temperance movement, the Eighteenth Amendment, establishing National Prohibition, was passed in 1919. That "noble experiment" lasted just fourteen (14) years. The Twenty-first Amendment, enacted in 1933, marked the abandonment of the effort to have a national policy prohibiting manufacture and sale of alcoholic beverages. The failure of the National Prohibition illustrated that noble motives were insufficient and, without broad support in public opinion, were ineffective and even destructive of the belief in the rule of and respect for law. Regulation of intoxicating liquor was to be undertaken at the level of government at which it was able to obtain broad support. In the future, primarily state, not national, regulation was to govern intoxicating liquors.

The ratification of the Twenty-first Amendment represented a constitutional commitment to make permanent the policy behind the Webb-Kenyon Act: that the state be the focus of intoxicating liquor control. As observed by the

Swedenburg court, Section 2 of the Twenty-first Amendment "effectively constitutionalizes most state prohibitions regulating importation, transportation, and distribution of alcoholic beverages from the stream of interstate commerce into the state." *Swedenburg v. Kelly*, 358 F.3d 223, 232 (2d Cir. 2004) (quoting in part *Craig v. Boren*, 429 U.S. 190, 205-206 (1976)). Expressed in another way, Section 2 grants "the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.* 445 U.S. 97, 110 (1980).

As originally proposed, Section 3 of the Twenty-first Amendment would have given Congress concurrent power to regulate sales. That section was eliminated. At the time, Senators Blaine and Wagner explained that Section 3 would have been inconsistent with Section 2.

Section 2 was to return effective regulatory power to the states. The drafters of the Twenty-first Amendment, like the drafters of the Webb-Kenyon Act, did not wish to encourage discriminatory legislation. They were, however, prepared to endure it to assure that state regulation of intoxicating liquor would not be undermined. Prior to its consideration by the House, Congressman Lea objected to Section 2 because it would protect "unwise" or "improvident" state liquor laws. 76 Cong. Rec. 2776 (House)(1933). In submitting this language to state conventions, Congress believed that the goal of ensuring effective state regulation of intoxicating liquors was paramount to the risk that states may enact laws that some may deem to be unwise or imprudent. The Twenty-first Amendment was intended to ensure that each state was endowed with the power to regulate independently intoxicating liquors in accordance with "local sentiment and local habits" *see, e.g.* 76 Cong. Rec. 4146 (1933) and to restore to the states "absolute control in effect over interstate commerce

affecting intoxicating liquors which enter the confines of the states", *see, e.g.*, Comments of Senator Blaine, 76 Cong. Rec. 4143 (1933).[4]

The purpose and effect of the Twenty-first Amendment was to free states from the limits imposed by the dormant Commerce Clause regarding the regulation of importation, distribution and sale of intoxicating liquors. While judicially created limits on state regulation over interstate commerce of other products may have made sense, the need to create a "safe harbor" for the states' enforcement authority over intoxicating liquors was primary.[5]

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[4] The Senate twice was presented with language limiting Section 2 of the proposed Twenty-first Amendment to the protection of "dry" states. The proposal twice was rejected. The first version, of what became the Twenty-first Amendment, was proposed in December, 1932, and contained a clause protecting states that prohibited the manufacture and sale of intoxicating liquor. The Senate Judiciary Committee, in its report, changed the language to that which was ultimately enacted as Section 2. The full Senate had an opportunity to reconsider the expanded scope of paragraph 2 when Senator Glass proposed that the amendment be limited to states prohibiting manufacture and sale of intoxicating liquors, with the Commerce Clause continuing to constrain alcoholic beverage legislation in states permitting such manufacture and sale. The Glass amendment was rejected. 76 Cong. Rec. 4219, 4229 (1933). This history, in great detail, was brought to the attention of the Supreme Court when it considered *Young's Market*. The Court unanimously rejected an appeal to history not because history pointed in a direction the Court did not wish to go, but because the Court considered it unnecessary and unwise. Long before, this Court had made clear that the effect of the Wilson Act was not limited to states that prohibited the manufacture and sale of intoxicating liquor. *Vance v. Vandercook*, 170 U.S. 438, 447 (1898); *Reymann Brewing Co. v. Brister*, 179 U.S. 445, 454-55 (1900); *Pabst Brewing Co. v. Crenshaw*, 198 U.S. 17, 29 (1905).

[5] A political scientist noted in 1934: "Those who view with apprehension the centralizing tendencies of New Deal legislation may find solace in the antithetical development in the field of liquor control. The uniform control achieved by the Eighteenth Amendment was the object of applause until its evident unworkability was discovered. It is one of the

After Repeal, "true temperance" meant sustainable moderation; effective control meant what could be enforced. Raymond B. Fosdick & Albert L. Scott, *Toward Liquor Control*, at 7 (1933). The regulation of intoxicating liquor struggled to reconcile a tension caused by two contrasting images: a legitimate commodity, manufactured and sold by willing producers versus a dangerous intoxicating beverage, capable of being abused. Alcohol was to be available, but

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paradoxes of American politics that we have destroyed the possibility of centralization in the field of liquor control at the same time that we have been attempting to achieve greater centralization in a number of activities hitherto believed to be completely in the field of state authority." Dayton E. Heckman, "Contemporary State Statutes for Liquor Control," 28 Am. Poli. Sci. Rev. 628 (1934).

In 1939, then Solicitor General Robert Jackson (who was one of the primary proponents of the creation of a national market and of the dormant Commerce Clause doctrine) stated: "The Twenty-first Amendment to the Constitution, which repealed prohibition, provided that the transportation into any State of intoxicating liquors, in violation of the laws of such State, is prohibited. Thus an exception was made to the generally exclusive power of Congress, and control of commerce between States in intoxicating liquors was handed back to the States of destination. The purpose, and I intend no criticism of it, was to protect each State from importations that would defeat its own policy of dealing with the moral and social problems incident to the liquor traffic.

The power thus given to protect their social policy many States turned, under pressure from local liquor interests, to the protection of home industry. Local beer is given an effective tariff protection by imposing higher sales taxes on out-of-state beer, or special license fees and restrictions are placed on those who sell it. The States thus discriminated against have then responded with all of the weapons of modern tariff reprisal, such as retaliatory taxes, and inspections and partial and complete embargoes. A beer war has involved many States and perverted the purpose of the Amendment. Such legislation applied to intoxicating liquor, however, is quite properly sustained by the Supreme Court." Jackson, "Trade Barriers—A Threat to National Unity," in Trade Barriers Among the States: The Proceedings of the National Conference on Interstate Trade Barriers, April 5,6,7, 1939 (Chicago).

rigidly licensed. Unrestricted trade was not to be permitted; low prices and wide availability were rejected as categoric definitions of the public good. [6] Disparate treatment of imported and in-state intoxicating liquors was to be permitted.

III. JUDICIAL INTERPRETATION OF THE TWENTY-FIRST AMENDMENT.

Section 2 of the Twenty-first Amendments provides as follows:

> The transportation or importation into any State, Territory, or Possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

"The Amendment was not a narrow legislative delegation of federal authority; it was the will of a nation speaking through its constitutional process." *Swedenburg v. Kelly*, 358 F.3d 223, 227 (2d Cir. 2004). Moreover, this national consensus was achieved just seventy years ago. The plain language of the Amendment exclusively reserves to the states the right to regulate "transportation or importation" of intoxicating liquors. Nothing in the language of the Amendment

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[6] After passage of the Twenty-first Amendment, states, for the most part, chose to follow one of two models in order to curb increased sales, abusive sales practices, and excessive consumption: state monopoly of the distribution chain or the three-tier system. The three-tier system of distribution prevails today in a majority of states. *See Bainbridge v. Bush*, 148 F. Supp. 2d 1306, 1308 (M.D. Fla. 2001), vacated by *Bainbridge v. Turner*, 311 F.3d 1104 (11th Cir. 2002). The three-tier system is designed to prevent vertical integration in the liquor industry by "tied houses." Direct links between manufacturers and retailers, and disproportionate influence between the two, has historically led to increased sales, abusive sales practices and excessive consumption. The three-tier system interjects checks and balances by separating producers from consumers through a distinct, mandatory, transparent and accountable distribution system. *See S.A. Discount Liquor, Inc. v. Texas Alcoholic Beverage Comm'n*, 709 F.2d 291, 293 (5th Cir. 1983).

limits the states' power to regulate "transportation and importation." As such, it is clear from "the scope of the Twenty-first Amendment's grant of authority . . . that it is exempted from the effect of the dormant commerce clause." *Id.* at 231 (citing *Craig v. Boren*, 429 U.S. 190, 206 (1976)).

Shortly after its enactment, this Court recognized the broad powers conferred upon the states by the Twenty-first Amendment. *See e.g., State Board of Equalization v. Young's Market Co.*, 299 U.S. 50 (1936) (upholding a statute that imposed a license fee on beer importers); *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401 (1938) (upholding limitation on the types of blended spirits imported into the state, which was not imposed upon those produced in state); *Ziffrin v. Reeves*, 308 U.S. 132 (1939) (upholding regulation of the exportation of alcoholic beverages out of the state). Specifically, these cases upheld the states' power to regulate intoxicating liquor even when it burdens out-of-state interests vis-à-vis in-state interests. *Id.* The common thread running through these decisions is the recognition that control of importation is the essential component of the states' licensing and regulatory authority and that the Twenty-first Amendment insulates that authority from a dormant Commerce Clause challenge.[7]

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[7] This Court refused to adopt a constitutional analysis which inquires into the underlying purposes of a state statute and determines whether regulatory or protectionist aims predominate. *See, Indianapolis Brewing Co. v. Liquor Control Commission*, 305 US 391 (1939); *Finch v. McKittrick*, 305 U.S. 395 (1939). These cases were challenges to retaliatory (or "protective", as Justice Brandeis suggested they might be termed) statutes limiting or banning importation of alcoholic beverages from states which themselves, in the eyes of the "protective" state, discriminated against or burdened importations. The burdens cited varied from excise tax differentials, to import fees, to requirements that importers sell only to in-state licensed wholesalers.

The Court might have rejected all such legislation or permitted it only when imposed against protectionist rather than regulatory statutes, but either choice would have compelled the Court to evaluate the statute being retaliated against. If the Court rejected retaliation, but did not evaluate the statute which provoked the prohibited response, there would be neither a political nor a judicial remedy against allegedly protectionist legislation. Instead, the Court chose to permit protective statutes, and avoid judicial intrusiveness into the myriad details of complex state regulatory systems.

The Court left trade disputes involving intoxicating liquors to be resolved through the political process. By the end of the 1930's, states, generally speaking, were no longer enacting protectionist laws regarding intoxicating liquor. Joseph Kallenbach, "Interstate Commerce in Intoxicating Liquors under the Twenty-first Amendment," 14 Temple L.Q. 474, 488 (1940). The problem did not disappear, but, like alcohol abuse, it was controlled.

The Court, however, did not declare state regulation of intoxicating liquor free from all limitations. Justice Brandeis wrote in *Young's Market*: "The plaintiffs insist that to sustain the exaction of the importer's license fee would involve a declaration that the Amendment has, in respect to liquor, freed the states from all restrictions upon the police power to be found in other provisions of the Constitution. The question for decision requires no such generalization." 299 US 59, 64 (1936). The Court subsequently articulated such limitations. *See Craig v. Boren*, 429 U.S. 190, 206 (1976) (Equal Protection Clause); *See Constantineau v. Wisconsin*, 400 U.S. 433 (1971) (Due Process Clause); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 941 (1982) (Establishment Clause); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (First Amendment). No constitutional provision, other than the Twenty-first Amendment, is at issue in this case.[8]

Similarly, the Court has made it clear that states may not attempt to regulate commercial activity extraterritorially. *See Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573 (1986) (an affirmation statute that controlled the price of intoxicating liquor in other states);

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[8] Dormant Commerce Clause analysis is not relevant because of the passage of the Twenty-first Amendment and congressional enactment of the Webb-Kenyon Act.

Healy v. Beer Inst., Inc.., 491 U.S. 324 (1989) (striking down a price affirmation statute with extraterritorial effect);[9] *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964) (invalidating New York's attempt to close down an airport duty free shop, whose products were delivered to the ultimate consumer and whose products were used abroad). Again, no claim is being made here that Michigan is attempting to regulate extraterritorially.

Only once has this Court applied dormant Commerce Clause analysis to a regulation arguably involving the importation of alcoholic beverages. In *Bacchus Imports, Ltd. v. Dias*, 408 U.S. 263 (1984), Hawaii imposed a tax on intoxicating liquors but exempted from taxation two locally produced products, ti root brandy and pineapple wine. The court struck down the Hawaii tax on the basis that it was intended to "favor local liquor industries" and therefore was preempted by the "strong federal interest in preventing economic Balkanization." *Id.* at 276. However, the exemptions had explicitly been passed and were explicitly defended by the state as exclusively motivated by a desire to aid local

[9] Justice Scalia, concurring in *Healy*, stated that the statute's "discriminating character eliminates the immunity afforded by the Twenty-first Amendment. *Id.* at 344. Importantly, he did not find that any difference between the treatment of imports and the treatment of in-state products was unconstitutionally protectionist and unprotected by the Twenty-first Amendment. "*Every* use of §2 could be called "discriminatory" in the sense that plaintiffs use that term, because every statute limiting importation leaves intrastate commerce unaffected." *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 853 (7th Cir. 2000). Connecticut did not treat out-of-state suppliers differently from in-state suppliers. It distinguished brewers, whether located in or out-of-state, who sold only in Connecticut, from those, whether located in or out of state, who sold both in Connecticut and in neighboring states. Justice Scalia objected to differential treatment of interstate commerce, not differential treatment of importation. *Healy v. Beer Dist.*, 491 U.S. 324, 344 (1988).

industry. The Court stated that "[t]he central purpose of [Section 2 of the Twenty-first Amendment] was not to empower States to favor local liquor industries by erecting barriers to competition" at *Id.* Hawaii insisted that it had no other purpose than a subsidy for the exemption. Official Transcript Proceedings before the Supreme Court of the United States. January 11, 1984, p. 35. Significantly, the relevance of the Webb-Kenyon Act was never argued to the Court. Furthermore, the Twenty-first Amendment was not even cited by Hawaii until it submitted its brief to this Court. Writing for the majority, Justice White found this 'belated" argument unconvincing.[10]

The Court remanded the case for a determination of remedy. Reimbursement, if ordered, would function like a fine. It would not disable Hawaii's future capacity to regulate the importation, distribution, and sale of intoxicating liquors.[11]

[10] Three current members of the Court sat on the *Bacchus* case and all dissented on the basis that the "commerce clause claim is squarely foreclosed by the Twenty-first Amendment to the United States Constitution." *Bacchus v. Dias*, 468 U.S. 263, 278 (1894) (J. Stevens with J. Rehnquist and J. O'Connor dissenting). In recognition of the fact that hard cases make bad law, *Bacchus* should at the least be confined to its unique facts and procedural history. At best, the case represents the Court's acknowledgement that there was not even a colorable attempt by the state of Hawaii to justify the exemption on any grounds other than naked economic protectionism nor was there any attempt below to even argue the Twenty-first Amendment. Alternatively, the case stands for the proposition that it is constitutionally impermissible to distinguish between in-state and out-of-state suppliers for the sole purpose of raising revenue, intentionally creating the functional equivalent of a tariff, but constitutionally permissible when a purpose is to control importation and transportation when the intoxicating liquor is destined for delivery or use within the state.

[11] The author of the dissent in *Bacchus* later lamented, dissenting in *City of Newport v. Iacabucci*, 479 U.S. 92, 98 (1986): "In recent years, however, the Court has completely distorted the Twenty-first Amend-

Unfortunately, even if it was not wrongly decided, *Bacchus* has been misinterpreted by lower courts and cited for the proposition that it represents a pendulum swing by the Court from a broad to a narrow reading of the Twenty-first Amendment. *See, e.g., Heald v. Engler*, 342 F.3d 517, 523-24 (6th Cir. 2003); *Dickerson v. Bailey*, 336 F. 3d 388, 400 (5th Cir. 2003); *Beskind v. Easley*, 325 F.3d 506, 514 (4th Cir. 2003); *Bainbridge v. Turner*, 311 F. 3d 1004, 1108 (11th Cir. 2002). That faulty reading has led those lower courts to apply traditional dormant Commerce Clause analysis incorrectly to state regulations governing the importation, sale and distribution of intoxicating liquors.[12]

For reasons discussed above, however, *Bacchus* can *not* be read so broadly and does *not* stand for the proportion that the Court had embraced a sea change in the interpretation of the

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ment. It now has a barely discernible effect in Commerce Clause cases . . ." J. Stevens supported his conclusion by citation to *Healy* and to *Bacchus*, which did not have such a devastating effect. Justice Stevens' gloomy assessment was perhaps colored by his disapproval of the path taken by this Court in *California v. Larue*, 409 U.S. 109 (1973) and continued in *City of Newport*. The path, of course, was decisively rejected in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996).

[12] The *Heald, Dickerson, Beskind* and *Bainbridge* courts employed the traditional two step dormant Commerce Clause analysis. First, the courts examined whether the regulation in question "affects interstate commerce in a manner either that (i) discriminates against interstate commerce, or (ii) imposes burden on interstate commerce that are incommensurate with putative local gains." *Swedenburg v. Kelly*, 358 F.3d 223, 230 (2d Cir. 2003) (quoting *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200, 208 (2d Cir. 2004)). Second, concluding that the regulation in question failed to pass muster, the courts examined whether the regulation in question implicated one of the Twenty-first Amendment's "core concerns". If so, it may be "saved", notwithstanding its discriminatory effect. *Id.* As noted by the *Swedenburg* court, however, this analysis ignored (or at least rendered irrelevant) the express language of the Twenty-first Amendment, the Webb-Kenyon Act, and numerous decision of this Court. *Swedenburg*, at 231.

Twenty-first Amendment. *Bacchus* presents an unusual set of facts. The state insisted that its exclusive intent was to favor its own products in exempting them from an excise tax. This case simply did not implicate the state's interests under the Twenty-first Amendment. Certainly, no aspect of the ruling in this case provided a carte blanche for lower federal courts to recast Twenty-first Amendment analysis or discard state regulatory schemes governing the importation, sale and distribution of intoxicating liquor. Furthermore, as noted by the *Swedenburg* and *Bridenbaugh* courts, nothing in that case mandated dormant Commerce Clause or "core power" analysis when considering challenges to state importation regulation or to requirements that intoxicating liquors be distributed through in-state licensed entities. *See Swedenburg v. Kelly*, 358 F.3d 223, 236 (2d Cir. 2004); *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 851-54 (7th Cir. 2000), *cert. denied sub. nom., Bridenbaugh v. Carter*, 532 U.S. 1002 (2001).

This Court consistently has reaffirmed the right of states under the Twenty-first Amendment to control the importation of intoxicating liquor. In *North Dakota v. United States*, 495 U.S. 423 (1990), the court upheld labeling and reporting requirements for intoxicating liquor shipped to military bases, under concurrent jurisdiction. Justice Stevens wrote that "within the area of its jurisdiction, the state has 'virtually complete control' over the importation and sale of liquor and the structure of the liquor distribution system." *Id.* at 431; *see California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980); *see also Capital Cities Cable, Inc. v. Crisp*, 476 U.S. 694, 712 (1984); *California Board of Equalization v. Young's Market Co.*, 299 U.S. 59 (1936)." He further noted that that "[i]n the interest of promoting temperance, ensuring orderly markets conditions, and raising revenue, the state established a comprehensive system for the distribution of liquor within its borders. That system is

unquestionably legitimate." *North Dakota v. United States*, 495 U.S. 423, 432 (1990) (citing *Carter v. Virginia*, 321 U.S. 131 (1994); and *State Board of Equalization v. Young's Market, Co.*, 299 U.S. 59 (1936))[13].

[13] The Sixth Circuit dismissed as dictum the relevance of the language in *North Dakota*, describing state importation controls as being unquestionably legitimate, because the case involved a Supremacy Clause challenge. The *Heald* Court, however, failed to appreciate the basis for the *North Dakota* decision and the implications of that decision on a dormant Commerce Clause challenge to state importation controls.

The plurality concluded that there was no discrimination because the United States could, like all other retailers in North Dakota, purchase its imported intoxicating liquor from in-state licensed wholesalers. This conclusion presupposes that all other retailers were compelled to so purchase from in-state licensed wholesalers. If a retailer could buy directly from an out-of-state supplier, the terms of the transaction might be better than those available to the United States from the in-state wholesaler, thus making discrimination possible. Justice Scalia reached a similar result because he believed that the state, under the Twenty-first Amendment, could compel the United States, as well as all other retailers, to purchase intoxicating liquors only from licensed in-state wholesalers.

More recently, this Court has again recognized the states' power to control importation of intoxicating liquors. In *44 Liquormart, Inc. v. Rhode Island*, 517 U.S.484 (1996), this Court held that the Twenty First Amendment gave no authority to states to violate the First Amendment. The advertising restriction at issue was rejected because there was no evidence that it significantly advanced the state interest in temperance and because there were less restrictive alternatives available. These less restrictive alternatives were direct regulation of prices or taxation, as conceded by the state's own expert. Justice Stevens, joined by Justices Kennedy, Souter and Ginsburg at 1509 and Justice O'Connor joined by Chief Justice Rehnquist and Justices Souter and Breyer at 1521. The principal opinion, by Justice Stevens, also referred to the possibility of direct limitation of per capita purchases. None of these alternatives can be effectively implemented in the absence of a requirement that all intoxicating liquors sold or delivered for use within the state go through an in-state licensed entity.

IV. THE STATE'S REGULATORY STRUCTURE THAT PERMITS IN-STATE WINERIES TO SHIP ALCOHOL DIRECTLY TO CONSUMERS BUT RESTRICTS OUT-OF-STATE WINERIES IS PERMISSIBLE UNDER SECTION 2 OF THE TWENTY-FIRST AMENDMENT.

Currently, there is a split among six Circuit Courts of Appeal regarding the central question presented on this appeal. Three circuits have invalidated state laws that prohibit out-of-state wineries (which are *not* subject to the regulatory reach of the state) to ship direct to consumers but permit in-state wineries (which are licensed and are subject to effective control by the state) to sell, under certain circumstances, direct to consumers. *Heald v. Engler*, 342 F.3d 517 (6th Cir. 2003); *Dickerson v. Bailey*, 336 F.3d 388 (5th Cir. 2003); *Beskind v. Easley*, 325 F.3d 506 (4th Cir. 2003). These three circuits, as well as the Eleventh Circuit, utilized traditional dormant Commerce Clause analysis in reaching their decisions.[14] In doing so, they ignored or misinterpreted

[14] In *Heald* and *Dickerson*, the Sixth and Fifth Circuits respectively struck down the direct shipping prohibition in its entirety. *Heald*, at 527; *Dickerson*, at 409-410. In *Beskind*, the Fourth Circuit struck down only the in-state exemption and left "in place the three-tiered system that North Carolina had employed since 1937 and has given every indication it wants to continue to employ." *Beskind*, at 519. In *Bainbridge v. Turner*, 311 F.3d 1104 (11th Cir. 2002), the Eleventh Circuit vacated a summary judgment for the state and remanded on the issue of whether Florida's statutory scheme was closely related to the "core concern" of the Twenty-first Amendment of raising revenue or was a pretext for mere economic protectionism. *Bainbridge*, at 1104. The Eleventh Circuit made clear, however, that the standard to be met was far less than the least restrictive alternative. In dissent, Judge Roney stated: "In these credit card days of easy purchase by telephone and internet, this statute reflects the 'core' concerns of the Twenty-first Amendment that alcoholic beverages not be sold to underage consumers and not be sold effectively unregulated or untaxed. This court improperly treats as equal the prospective loss of a beverage license to an in-state firm and the loss of a Florida beverage

the Twenty-first Amendment, the Webb-Kenyon Act, 27 U.S.C. § 122, and numerous decisions of this Court, including, without limitation, *State Bd. Of Equalization v. Young's Market Co.*, 299 U.S. 59 (1936), *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964) and *North Dakota v. United States*, 495 U.S. 423 (1990).

Two Circuits have upheld the differential treatment between in-state and out-of-state wineries noting that it was "a permissible expression of the state's authority under Section 2 of the Twenty-first Amendment." *Swedenburg v. Kelly*, 358 F.3d 223,231 (2d Cir.2004); *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000), *cert denied, sub. nom., Bridenbaugh v.* Carter, 532 U.S. 1002 (2001). Both the *Swedenburg* and *Bridenbaugh* courts rejected the contention that the express language of the Twenty-first Amendment was subordinate to the doctrine of the dormant Commerce Clause. *Swedenburg*, at 231; *Bridenbaugh*, at 849 ("This case pits the Twenty-first Amendment, which appears in the Constitution, against the 'dormant commerce clause', which does not"). They also rejected the argument that the Twenty-first Amendment only protects state regulation "that advance so-called core concerns." *Swedenburg*, at 233; *Bridenbaugh*, at 851. Accordingly, the *Swedenburg* and *Bainbridge* courts rejected as "flawed" the two-step approach embodied in traditional dormant Commerce Clause analysis that was applied by the other four circuits. *Swedenburg*, at 231; *Bridenbaugh*, at 853.

In a thoughtful and historically grounded analysis, the *Swedenburg* court upheld New York laws, which regulated the importation of intoxicating liquors by requiring that they pass through an in-state licensee. The *Swedenburg* court

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license to an out-of-state firm, if one is required at all. One would put the firm out of business, the other would simply restrict the market by a state." *Id.* at 1116.

noted that "[w]ith Prohibition's repeal, the drafters of the Twenty-first Amendment drafted Section 2 to allow states the authority to circumvent dormant Commerce Clause protections, provided that they were regulating the intrastate flow of alcohol." *Swedenburg*, at 237.

In reaching this conclusion, the *Swedenburg* court specifically recognized the importance of the requirement that all imported intoxicating liquors be delivered to an in-state licensee, thereby assuring effective regulation. This regulatory concern is unquestionably valid.

> Presence ensures accountability. Records of sales and compliance with New York's regulatory requirements must be available for inspection by SLA officials. Violations are subject to disciplinary measures carried out in New York, including fines imposed against the bond all license holders are required to post. New York treats wine importers the same as it treats internal sellers; all must either utilize the three-tier system or obtain a physical presence from which the state can monitor and control the flow of alcohol.

Swedenburg, at 237-238.

In contrast, the *Heald* and *Dickerson* decisions threaten to dismantle complex state regulatory systems governing intoxicating liquors that have worked remarkably well for over seventy (70) years. Through these delicately balanced and historically tested regulatory schemes, states have addressed several fundamental interests: preventing illegal sales to minors, reducing abuse of intoxicating liquors, inhibiting overly aggressive marketing, creating orderly distribution and importation systems, collecting taxes, and preventing a recurrence of the problems that led to the enactment of National Prohibition.

The *Heald* decision substantially undermines the effectiveness of Michigan's regulatory regime by proscribing the power to control importation. In Michigan, state law requires

that all intoxicating liquor must either be produced in-state by a licensed entity or be produced out-of-state and shipped in-state to a licensed entity. Either way, the source of the intoxicating liquor to be consumed in Michigan falls under the licensing and enforcement umbrella of the State. If that intoxicating liquor is produced, imported or sold in a manner inconsistent with state law, Michigan has created a transparent and accountable distribution system so that any such violation can be ascertained, punished, and deterred in the future. None of these regulatory functions can be effectively exercised over an unlicensed out-of-state entity. Relying upon inapposite dormant Commerce Clause analysis, the Sixth Circuit invalidated this regulatory regime because in-state wineries (which are licensed and subject to effective control by the state) may sell, under certain circumstances, direct to consumers while out-of-state wineries (which are *not* licensed and *not* subject to effective control by the state) must first sell to a licensed importer.

While this case may involve oenophiles, it is constitutionally indistinguishable from one involving spirits or beer. There is no distinction between the importation of a highly allocated cult wine and that of an alcopop or distilled spirits. How are regulators expected to police underage sales effectively when a resourceful teenager can order distilled spirits through the mail? A state cannot effectively hold an out-of-state licensed entity accountable for such a violation of state law. Is state regulation at risk because of the existence of brewpubs, since in-state suppliers are permitted to sell on-premise?

The logic of the opinions would seem to apply to importation controls that result in any difference in the regulatory treatment of an out-of-state or an in-state licensed supplier, of an out-of-state or in-state licensed wholesaler, or of an out-of-state or in-state licensed retailer, even where the purpose of that importation control is to ensure compliance

with state law by requiring that all importation be to a licensed entity physically present within the state. The licensed, physical presence of the source of the intoxicating liquor, be it manufacturer, importer, or wholesaler, is the cornerstone of an orderly, transparent, and accountable alcoholic beverage distribution system. The validity of such a system has never been questioned by this Court.

The Sixth Circuit also ignores the competitive advantage that its decision confers upon out-of-state suppliers. By effectively exempting out-of-state suppliers from the regulatory reach of the state, these suppliers are free to violate a state's laws without fear of consequences. Accordingly, the inequitable outcome of the decision will be that out-of-state suppliers are accorded a benefit not enjoyed by in-state suppliers, while at the same time, states are hamstrung in the effective enforcement of their laws over out-of state suppliers.

In summary, Amicus Curiae NBWA urges the Court to reverse the *Heald* decision and affirm the *Swedenburg* decision. The history of the Twenty-first Amendment and a careful analysis of the Court's jurisprudence thereunder makes it clear that "a state is totally unconfined by traditional commerce clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders." *See, Department of Revenue v. James B. Bean Distilling Co.,* 377 U.S. 341, 344 (1964) (holding that the Twenty-first Amendment does not grant states the power to intrude upon the federal interest in regulating the importation of foreign intoxicating liquor).

Simply put, the Twenty-first Amendment grants the states "virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.,* 445 U.S. 97, 110 (1980). If no other constitutional provisions are at issue, and if the state is

not seeking to regulate intoxicating liquors extraterritorially (neither of which is at issue here), the state is at liberty to regulate intoxicating liquors free from dormant Commerce Clause limitations. As such, Michigan, as a proper exercise of its regulatory function, should certainly be able to condition a winery's ability to ship direct to consumers upon the receipt of a license and upon the establishment of a physical presence in the state. In practical terms, these requirements are essential to effective enforcement.

V. THE *HEALD* DECISION DESTROYS THE KEYSTONE OF THE STATE'S REGULATORY POWER: THE RIGHT UNDER THE TWENTY-FIRST AMENDMENT TO CONTROL THE IMPORTATION OF INTOXICATING LIQUOR INTO THE STATE.

The disposition of this case requires an understanding of the underlying theory and history of alcohol regulation, the complexity and efficacy of the state's current regulatory structure, and the consequences of the lower court's ruling on Michigan's legitimate goals of preventing illegal sales to minors, reducing abuse of intoxicating liquor, inhibiting overly aggressive marketing, creating orderly distribution and importation systems, and collecting taxes. Consideration of these compelling concerns leads to but one conclusion: that the current regulatory system has worked remarkably well for over seventy (70) years and should not be discarded.

Following Prohibition, states generally followed one of two models in enacting intoxicating liquor regulations. A minority of states adopted some form of public monopoly. *See* George A. Shipman, *State Administrative Machinery for Liquor Control*, 7 Law & Contemp. Prob. 600, 612 (1940). While this model vested the most control in the state, it also involved the displacement of private operation by public operation. A majority of states elected to adopt a three-tier

system of distribution in their alcoholic beverage industry, preserving that degree of entrepreneurial autonomy that was consistent with comprehensive regulation.

To avoid the harmful effects of vertical integration in the alcohol industry, the three-tier system effectively restricts manufacturers, wholesalers, and retailers to one level of activity. Prior to Prohibition, large companies often controlled, through vertical and horizontal integration, both the production and sale of intoxicating liquors. The resulting "tied-houses" led to excessive retail capacity and cutthroat competition for market share, which, in turn, led to intemperate consumption as a consequence of excessive sales stimulation. The three-tier system eliminates the probability of "tied house" relationships or vertical integration. It also prevents companies with monopolistic tendencies from dominating all levels of the industry and assures that the source of distribution will have a licensed in-state presence. The three-tier system thus creates a transparent and accountable distribution system in the industry.

While each state has implanted its unique imprint on its three-tier system over the last seventy (70) years, the utility and effectiveness of the three-tier model has been well demonstrated. Before and during National Prohibition, abuse of intoxicating liquors was an acute problem. Since Repeal, it has been at worst a chronic one. The three-tier system has worked remarkably well and withstood the test of time. Furthermore, the need for and current relevance of the three-tier system is perhaps greater today than at any time in recent history. Public concern with both intemperate and underage consumption is obvious. The intoxicating liquor industry has experienced unprecedented consolidation in recent years, which makes vertical integration, with the attendant "tied house" evils, far more likely without appropriate controls. Such developments highlight the need for greater control of the productive and distributive channels of intoxicants, not

deregulation, and the need to protect state enforcement powers in order to curb excessive sales, abusive sales practices and intemperate consumption.

Article Four of Michigan's Constitution provides that "the legislature may by law establish a liquor control commission which, subject to statutory limitations, shall exercise complete control of the alcoholic beverage traffic within this state, including the retail sale thereof." Const. 1963, Act. 4, § 40. In accordance with the explicit power granted by the Twenty-first Amendment of the United States Constitution and Article Four of the Michigan Constitution, the Michigan Liquor Control Commission adopted a three-tier system. Generally speaking, the system requires consumers to purchase and receive intoxicating liquors from licensed in-state retailers; retailers to purchase and receive intoxicating liquors from licensed wholesalers; and wholesalers to purchase and receive intoxicating liquors from licensed manufacturers. Mich. Comp. Laws § 436.1203.

Michigan permits an exception to the direct shipping prohibition for licensed wineries with an in-state presence. These wineries (which are subject to the state's enforcement powers) may ship direct to consumers provided that they comply with all of the state's liquor laws. Mich. Comp. Laws § 436.113 (a) & 436.1203 (1)—(8). There is no similar exception for wineries, which do not have an in-state presence (and which are therefore not subject to the state's enforcement powers).

Michigan's different treatment of wineries with an in-state presence from those without such a presence clearly does not violate the United States Constitution. Control of importation is the essential component of the state's licensing and regulatory authority and the Twenty-first Amendment insulates that power from dormant Commerce Clause challenge and from a charge of "discriminatory" treatment.

The *Heald* decision eliminated this fundamental element of Michigan's "comprehensive system for the distribution of liquor within its borders." *See North Dakota v. United States*, 495 U.S. 423, 432 (1990) (citing *Carter v. Virginia*, 321 U.S. 131 (1994) and *State Board of Equalization v. Young's Market Co.*, 299 U.S. 59 (1936)). Furthermore, the *Heald* court's broad ruling not only undermines effective regulation, but also discriminates against licensed in-state wholesalers and retailers, since they, unlike unlicensed out-of-state suppliers, are subject to enforceable regulations and taxation.

In *Beskind v. Easley*, 325 F.3d 506 (4th Cir. 2003), the United States Court of Appeals for the Fourth Circuit incorrectly applied dormant Commerce Clause analysis but did recognize and protect the integrity and efficacy of the North Carolina regulatory system. In *Beskind*, out-of-state wineries challenged, under the Commerce Clause, North Carolina's prohibition on the direct sale of wine to North Carolina residents by out-of-state wineries. The trial court in *Beskind* agreed with the out-of-state wineries that North Carolina's laws prohibiting direct wine sales by out-of-state wineries violated the Commerce Clause because North Carolina permitted in-state wineries to sell directly to consumers. At the request of the out-of-state wineries, the trial court enjoined North Carolina from enforcing its laws prohibiting direct sales of wine to North Carolina residents by out-of-state wineries.

On appeal, North Carolina argued that the trial court's remedy was inappropriate and that it should be permitted to cure the discrimination against out-of-state wineries by prohibiting in-state wineries from selling wine directly to consumers, thus preserving the comprehensive regulatory system. The Fourth Circuit agreed, specifically noting that the North Carolina three-tier system "furthers its Twenty-first Amendment interests in regulating the consumption of alcoholic beverages, enforcing a minimum age for the pur-

chase and consumption of such beverages, limiting the location from where they are sold, controlling the contents of such beverages, and collecting taxes in connection with their sale and distribution." *Id.* at 516.

In refusing to effectively dismantle this system, the Court further stated that:

> Additionally, North Carolina has maintained its ABC laws in implementation of the Twenty-first Amendment since 1937, shortly after the end of Prohibition, but only added the preference for local wineries over 40 years later, perhaps to promote its local wine industry but certainly not to relinquish its power under the Twenty-first Amendment. And even as it added that preference for local wineries, it did not exempt them from a substantial portion of the ABC laws. Moreover, it did not retreat from its general mandate that the ABC laws be "liberally construed to prohibit the transportation and importation of alcoholic beverages except as permitted by those laws.

Id. at 519.

Although the *Beskind* Court erred in its analysis of the Twenty-first Amendment, and an in-depth discussion of remedy is beyond the purview of this appeal, the *Beskind* case is important for its recognition that a narrow exemption contained in a state statute should not jeopardize an entire complex regulatory system that has worked remarkably well for over seventy (70) years.

CONCLUSION

Based on the arguments and authorities set forth above, Amicus Curiae National Beer Wholesalers respectfully requests that this Court reverse the holding of the United States Court of Appeals for the Sixth Circuit in *Heald v. Engler*, 342 F.3d 517 (6th Cir. 2003) and affirm the holding of the United States Court of Appeals for the Second Circuit in *Swedenburg v. Kelly*, 358 F.3d 223 (2d Cir. 2004).

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In The Supreme Court Of The United States

JENNIFER M. GRANHOLM, GOVERNOR, et al.,
Petitioners,

v.

ELEANOR HEALD, et al.,
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF OHIO AND 32 OTHER STATES AS *AMICI CURIAE* SUPPORTING PETITIONERS

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QUESTION PRESENTED

Does a State's regulatory scheme that permits in-state wineries directly to ship alcohol to consumers but restricts the ability of out-of-state wineries to do so violate the dormant Commerce Clause in light of Sec. 2 of the Twenty-first Amendment?

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INTEREST OF THE *AMICI* STATES

The ability to regulate the flow of alcohol into their borders is an issue of paramount concern to the States. This is particularly so in light of the growth of the Internet and electronic commerce—tools that have dramatically increased shipments from out-of-state sources directly to consumers' doorsteps. These evolving technologies threaten the States' ability to maintain control over alcohol distribution and to ensure that alcohol does not end up in the hands of children. These same technologies also threaten the States' ability to collect legitimate taxes on these consumer products.

The States file this *amicus* brief to assert the importance of their roles in controlling the importing of liquor into their borders. To be sure, some States distinguish between in-state and out-of-state wineries with regard to the ability to ship directly to consumers. But this distinction falls squarely within the Twenty-first Amendment's grant of power to the States to regulate alcohol imports. Equally important, distinguishing between in-state and out-of-state producers is rationally related to the States' legitimate concerns about enforcing and monitoring their liquor distribution systems.

The regulatory system used by most States, the three-tier system, allows the States to address these concerns by requiring all alcohol shipments to enter and arrive to the consumer through a licensed entity with a localized presence. By prohibiting out-of-state wineries from directly shipping to consumers, States are thus doing nothing more than requiring that all liquor sold for use in the State be purchased from a licensed entity that is subject to the enforcement and tax authority of the State.

The *amici* States have a strong interest in maintaining appropriate control over the distribution of alcohol within

their borders. Accordingly, we are an important voice in any conversation regarding the appropriate scope of the Twenty-first Amendment. We raise that voice here to ask the Court to reverse the decision below and hold that States may restrict out-of-state wineries from shipping directly into the State's borders, while at the same time allowing in-state wineries to ship directly to that State's residents.

SUMMARY OF ARGUMENT

The dormant Commerce Clause is a judicially-created doctrine meant to protect Congress's exclusive right to control interstate commerce. The Twenty-first Amendment, however, expressly grants the States the power to regulate one form of interstate commerce—namely, alcohol imported for in-state use. In exercising this power, the States remain subject to other constitutional provisions, such as the First Amendment. But, for those state regulations that lie directly within the Twenty-first Amendment's express grant of power to the States, the dormant Commerce Clause simply does not apply. The only case to even suggest otherwise is *Bacchus Imports v. Dias*, 468 U.S. 263 (1984), and, to the extent it does so, the *amici* States respectfully urge that it should be overturned. At the very least, *Bacchus* should apply only where, unlike the case here, the state regulation amounts to pure economic protectionism, unconnected to any liquor-control interest at all.

Further confirming the inapplicability of the dormant Commerce Clause, Congress has expressly authorized state regulation of alcohol imports. See 27 U.S.C. § 122 (the "Webb-Kenyon Act"). In light of this congressional allocation of power to the States, however, the key assumption underlying the dormant Commerce Clause—the need to protect Congress's exclusive control over interstate commerce—is not met. To the contrary, Congress has expressly spoken on the side of state regulation, and that

express use of Congress's Commerce power surely trumps any implications of the dormant Commerce Clause.

The practical realities of alcohol distribution, and in particular the growth of electronic commerce, demonstrate the importance of giving full breadth to the States' power under the Twenty-first Amendment. While no State bans alcohol imports entirely, nearly all States recognize the need to monitor those imports closely in order to ensure that alcohol flows only to adults. Moreover, the Twenty-first Amendment also recognizes that States have an important interest in maintaining their ability to collect appropriate excise and sales taxes on alcohol imports, an interest that is threatened by direct shipping to in-state consumers.

In short, dormant Commerce Clause principles simply do not apply at all to regulations, such as those here, that lie at the heart of the Twenty-first Amendment. If the Court finds otherwise, however, the *amici* States respectfully urge that the Court should, at the very least, modify the traditional dormant Commerce Clause test. By expressly assigning the States regulatory authority, the Twenty-first Amendment makes alcohol a constitutionally-unique product. The Court should adopt a more deferential dormant Commerce Clause test that recognizes this shared regulatory authority. In particular, even facially discriminatory statutes, at least so long as they do not reflect pure protectionism, should be subject only to rational basis review.

ARGUMENT

I. The dormant Commerce Clause does not bar State regulations designed to restrict the importation of alcohol for use within its borders.

This case does not lie at the intersection of the Commerce Clause and the Twenty-first Amendment.

Instead, it involves a straightforward application of the latter, which expressly allocates to States the power to control the importation of alcohol for in-state use. The statutes at issue here fall squarely within this text, and the case should end there. Indeed, as shown below, the Court's precedents have been remarkably consistent in reaffirming that regulations falling within the Amendment's textual grant are immune from dormant Commerce Clause challenges.

The only possible deviation from this principle was *Bacchus*, in which the Court appeared to measure the States' regulatory power by reference to the Twenty-first Amendment's "core concerns," rather than its text. If *Bacchus* did so, however, the *amici* States urge that it was wrongly decided and should be overruled. In the alternative, *Bacchus* should be limited to cases, like *Bacchus* itself, that involve pure economic protectionism. Limits on alcohol shipping like those at issue here, however, are an integral part of any "comprehensive system for the distribution of liquor" that pursues the legitimate aims of "promoting temperance, ensuring orderly market conditions, and raising revenue." *North Dakota v. United States*, 495 U.S 423, 432 (1990). Distinguishing between in-state and out-of-state wineries does not make these regulations illegitimate, for such distinctions merely reflect the need to have an accountable licensee within the State.

A. The Court's precedents have reaffirmed that States have broad power to regulate alcohol imports for in-state use.

The Court has consistently confirmed the States' power to control alcohol imports destined for in-state use. That pattern is reflected in several stages of the Court's jurisprudence.

With the Eighteenth Amendment, when Prohibition became the law of the land, federal attempts to regulate alcohol reached their pinnacle. The Eighteenth Amendment broadly prohibited manufacture, sale, and use of alcohol on a national level. But, within fourteen years, Congress acknowledged the failure of this "Grand Experiment." The adoption of the Twenty-first Amendment in 1933 both repealed Prohibition and *granted States the power to regulate alcohol*:

> Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.
>
> Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

At first, the Court held that this Amendment gave the States virtually unrestricted power over all aspects of liquor control. Of particular importance here, the Court said that Section 2 exempted alcohol regulation from normal Commerce Clause protections:

> The amendment which "prohibited" the "transportation or importation" of intoxicating liquors into any state in violation of the laws thereof, abrogated the right to import free, so far as concerns intoxicating liquors. The words used are apt to confer upon the State the power to forbid all importations that do not comply with the conditions that it prescribes.

State Board of Equalization v. Young's Market Co., 299 U.S. 59, 62 (1936). See also *Indianapolis Brewing Co. v. Liquor*

Control Comm'n, 305 U.S. 391, 394 (1939) (State's right to prohibit or regulate liquor importation is not limited by the Commerce Clause); *Ziffrin, Inc. v. Reeves*, 308 U.S. 132 (1939) (Twenty-first Amendment gives the State power to forbid all imports that do not comply with prescribed conditions). Thus, in this early stage, the Court seemed to suggest that the Amendment trumped the Commerce Clause entirely, not just the "dormant" portion.

The Court's turning point, which established the rule that we seek to reaffirm today, was *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964). In *Idlewild*, the Court invalidated a New York statute that sought to regulate shipments of alcohol that merely passed through John F. Kennedy Airport, as the alcohol was sold to those headed out of the country. *Id.* at 325. The Customs Service had approved the sales, pursuant to the federal Tariff Act of 1930, but the New York statutes forbade the sales because the dealer was not licensed by the State. *Id.*

The Court held that the Twenty-first Amendment did not save the New York law for at least two reasons. First, the law did not govern importation for "use" in the State, as the alcohol was merely passing through, and thus the law fell outside the Amendment's text. *Id.* at 333. Second, the Court noted that the transactions at issue were "carried on under the aegis of a law passed by Congress" under its express Commerce Clause power. *Id.* at 334.

But even in striking the law, the Court strongly reaffirmed that a "State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders." *Id.* at 330. That is, import restrictions tied to *in-state use* are expressly a matter of State concern, at least as long as Congress has not spoken to the contrary, so the dormant Commerce Clause yields fully there.

The Court in *Idlewild* left open the separate possibility—confirmed in a decision issued that same day, *Dept. of Revenue v. James B. Beam Distilling Co.* 377 U.S. 341 (1964)—that the Twenty-first Amendment did not have the same effect where other constitutional provisions were involved. That is, while the Twenty-first Amendment grants the State power to act, thereby overcoming any dormant Commerce Clause concerns, the States must still act in a manner consistent with other constitutional constraints on the exercise of governmental power, such as the First Amendment.

In the decades since *Idlewild*, the Court has reaffirmed, not undermined, those principles. At first blush, it may seem that those cases somehow "further eroded" the State's strong power over liquor control, as the Court's decisions repeatedly struck down State laws. Indeed, some laws that were initially upheld were later struck down. See *Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966) (upholding New York price affirmation statute), *overruled by Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573 (1986) (invalidating same law), and *Healy v. The Beer Institute*, 491 U.S. 324 (1989). But in truth, all of those cases—save *Bacchus*, discussed separately below—fit comfortably within, and built upon, *Idlewild's* principles. In those cases, State laws were invalidated either because the challenged regulation fell outside the constitutional text (*e.g.*, because it attempted to regulate alcohol other than that destined for in-state consumption), or because the regulation ran afoul of a constitutional constraint other than the dormant Commerce Clause.

In one category, the Court has continued to follow *Idlewild* in finding a State's power limited when a State seeks to regulate imports that are not intended *for in-state use*. Thus, just as shipments destined abroad were different, see

Idlewild, so too were shipments sent to a federal enclave, which was not part of the "State." *North Dakota*, 495 U.S at 431. See also *United States v. Mississippi Tax Commission*, 412 U.S. 363 (1973) (holding State may not regulate importation of alcohol into territory over which the United States exercises exclusive jurisdiction); *United States v. Mississippi Tax Commission*, 421 U.S. 599 (1975) (holding State may not regulate importation of alcohol into territory where State and United States exercise concurrent jurisdiction). Similarly, the Court has invalidated statutes that attempted to regulate alcohol outside State borders. See *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 585 (1986) (Twenty-first Amendment "gives New York only the authority to control sales of liquor in New York, and confers no authority to control sales in other States."); *Healy v. The Beer Institute*, 491 U.S. 324 (1989) (invalidating statute regulating beyond State borders).

In another category, several cases involved State regulations that *conflicted* with Commerce Clause legislation enacted by Congress. See *California Retail Liquor Dealers Ass'n. v. Midcal Aluminium*, 445 U.S. 97 (1980); *Capital Cities Cable v. Crisp*, 467 U.S. 691 (1984); *324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987). As noted above, *Idlewild* was also such a case. And, as in *Idlewild*, such cases do not involve the dormant Commerce Clause. Rather, when Congress speaks, the question is one of pre-emption under the Supremacy Clause. See *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 555-56 (1991) (O'Connor, J. dissenting). Thus, this group is merely part of the larger category of cases involving constitutional constraints other than the dormant Commerce Clause.[1]

[1] Further, here, not only has Congress *not* spoken on the side of the would-be direct shippers, to the contrary, as discussed in Part II below, Congress has expressly spoken to affirm the State's power.

In that broader category, the Court has repeatedly reaffirmed that State alcohol regulations, while freed from the dormant Commerce Clause, must still comport with other constitutional limitations. See *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516 (First Amendment); *Craig v. Boren*, 429 U.S. 190 (1976) (Equal Protection Clause); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971) (procedural due process); *Dept. of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964) (Export-Import Clause).

Notably, all of these cases, even while invalidating State laws that regulated beyond the core areas identified in the constitutional text, continued to affirm that State power remained virtually unchecked where core import-control was concerned, and to affirm that the dormant Commerce Clause gave way in the face of such regulations. "[T]he States have virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). See also *Idlewild*, 377 U.S. at 330 ("[T]he scope of the Twenty-first Amendment with respect to a State's power to restrict, regulate or prevent the traffic and distribution of intoxicants within its borders has remained unquestioned."); *Capital Cities Cable v. Crisp*, 467 U.S at 712 ("The States enjoy broad power under § 2 of the Twenty-first Amendment to regulate the importation and use of intoxicating liquor within their borders."). Indeed, as this Court ruled just eight years ago, "the Twenty-first Amendment limits the effect of the Dormant Commerce Clause on a State's regulatory power over the delivery or use of intoxicating beverages within its borders." *44 Liquormart, Inc. v. Rhode Island*. 517 U.S. 484, 516 (1996).

Thus, the Court need not strike out in new directions to protect the States' power here, which is expressed in the Twenty-first Amendment's text. To the contrary, limiting

State power within that text would violate the principle, reaffirmed in the cases above, that such State power remains "totally unconfined" by the Commerce Clause.

B. *Bacchus* was wrongly decided and should be overruled.

The decision in *Bacchus Imports v. Dias*, 468 U.S. 263 (1984), is the only precedent from this Court addressing the dormant Commerce Clause's impact on the States' power to regulate alcohol that does not fit comfortably within a textual reading of the Twenty-first Amendment. As discussed above, all of this Court's other precedent leading up to *Bacchus* recognized the States' power under the text of the Twenty-first Amendment to determine how liquor will be imported into the State for use therein. *Bacchus* is the sole outlier. But it has not improved with age, and should be overruled.

In *Bacchus*, Hawaii had imposed a twenty percent excise tax on sales of liquor at wholesale, but exempted locally-produced alcoholic beverages. 468 U.S. at 265. The exemption's admitted purpose—indeed its sole purpose—was to bolster the domestic industry. *Id.* at 267. An importer challenged the tax on Commerce Clause grounds. *Id.* at 265.

Although Hawaii had "expressly disclaimed any reliance upon the Twenty-first Amendment" in the court below, it raised it in defense of its statute in the Supreme Court. *Id.* at 274 n.12. Although the tax appeared to fit within the Amendment's text, five Justices rejected that defense. They concluded that laws that "constitute mere economic protectionism are . . . not entitled to the same deference as laws enacted to combat the perceived evils of unrestricted traffic in liquor." *Id.* at 276. Because Hawaii's

law did not fit within any "clear concern of the Twenty-first Amendment," the Amendment did not protect them from normal dormant Commerce Clause scrutiny. *Id.*

The three Justices[2] in dissent, however, noted that this approach was inconsistent with the Court's Twenty-first Amendment jurisprudence. According to the dissent, that precedent had treated direct regulation of the sale or use of liquor within the State as a "core § 2 power." *Id.* at 285, quoting *Capital Cities Cable*, 467 U.S. at 713. With regard to such regulations, the dissent argued, "the inherent limitation imposed by the Commerce Clause on the States [*i.e.*, the dormant Commerce Clause] is removed." *Id.* at 279 n.5. The question, they properly concluded, was not whether the statute fell within the Amendment's "central purposes," but rather whether it reflected an "exercise of the power expressly conferred upon the States by the [Amendment]." *Id.* at 287.

The dissent's reliance on the text of the Twenty-first Amendment, rather than the Amendment's purported "central purposes," is more faithful not only to the constitutional text, but also to this Court's precedent both before and after *Bacchus*. Indeed, all of this Court's precedent in the twenty years since *Bacchus* was decided has likewise adhered to a textual reading of the Amendment. Thus, overruling *Bacchus* will not throw out twenty years of jurisprudence. See *North Dakota v. United States*, 495 U.S 423, 431 (1990) ("States have the power to control shipments of liquor during their passage through their territory and to take appropriate steps to prevent the unlawful diversion of liquor into their regulated intrastate markets."); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516 (1996) ("the Twenty-first Amendment limits the effect of the Dormant Commerce

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[2] Justice Brennan recused himself, and thus only eight Justices heard the matter.

Clause on a State's regulatory power over the delivery or use of intoxicating beverages within its borders, ..."). Nor will overruling *Bacchus* toss the States into uncertainty as to how to regulate liquor importation. As *Bacchus* stands alone in this Court's jurisprudence and cannot be reconciled with the cases decided before it or after it, the time has come for the Court to overrule *Bacchus*.

At the very least, *Bacchus* should apply only in cases, such as *Bacchus* itself, where the regulation at issue was admittedly and solely protectionist in its purpose. If courts are faced with State regulations of alcohol that are purely protectionist, *Bacchus* may provide some limited guidance. Absent such circumstances, however, the courts need not examine incidental protectionist effects that a regulation may have.

Either way, whether *Bacchus* is overruled or narrowly read, the statute here is constitutional. It is an exercise of the State's core power under Section 2, and does not reflect the pure economic protectionism at issue in *Bacchus*. Thus, the dormant Commerce Clause simply does not apply.

C. The restrictions here fall within both the express language and the "core purposes" of the Twenty-first Amendment and, therefore, are unquestionably valid.

As explained above, the States should win on a textual reading of the Twenty-first Amendment, as the laws at issue fall within the constitutional text. Within the textual sphere, States are virtually unconfined by the Commerce Clause when they restrict the importation, transportation, or delivery of alcohol into the State for use, consumption or delivery therein. On this reading, that is the end of the analysis.

But even if the Court uses the *Bacchus* "core purposes" approach, rather than looking solely to text, the laws at issue here easily pass the test. Indeed, both the textual and the purpose-driven approaches often yield the same result, because, as the Court has explained, the text acknowledges the States' compelling interest in controlling the flow of alcohol into their borders. Regulatory schemes that "channelize the traffic, minimize the commonly attendant evils; [and] facilitate the collection of revenue," *Idlewild*, 377 U.S. at 331, thus meet the core purposes of the Amendment. State regulations that treat in-state producers differently from out-of-state producers can be an important component of achieving these legitimate legislative purposes.

Many States allow in-state wineries to ship directly to consumers, but do not allow out-of-state wineries this same privilege. Moreover, this restriction against out-of-state suppliers shipping directly to consumers is not limited to wine and wineries. Many States bar out-of-state suppliers from shipping "alcoholic beverages" into the State to anyone other than the State itself or a licensed wholesaler.[3] Were

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[3] See, *e.g.*, Ala. Admin. Code r. 20-X-8.04 (1); Ariz. Rev. Stat. § 4-250.01; Ark. Code Ann. § 3-7-106(a)(1); Del. Code Ann. tit. 4, § 501; Fla. Stat. Ann. § 561.545; Ga. Code Ann. § 3-3-32; Haw. Rev. Stat. Ann. § 281-3; Ind. Code §§ Ind. Code sec. 7.1-5-11-1.5 (but see Ind. Code Sec. 7.1-5-1-1, prohibiting transport or delivery of alcohol by anyone to anywhere within the state except as authorized by law, which in turn does not authorize in-state direct shipment to consumers in many circumstances, including (under Ind. Code sec. 7.1-3-12-2) from Indiana wineries to Indiana businesses or residences); Kan. Stat. Ann. §§ 41-104, 41-306, 41-306a(a); Ky. Rev. Stat. Ann. § 244.165; Me. Rev. Stat. Ann. tit. 28-A, § 2077-B; Md. Ann. Code art. 2B, § 16-506.1; Mass. Gen. Laws Ann. ch. 138, § 2; Miss. Code Ann. 97-31-47; Mont. Code Ann. § 16-3-402; N.J. Stat. Ann. § 33:1-2; Ohio Rev. Code Ann. §§ 4301.19, 4301.20 and Ohio Admin. Code 4301:1-1-22; Okla. Stat. Ann. tit. 37 § 505; Pa. Stat. Ann. tit. 47, § 4-410; S.C. Code Ann. § 12-21-1610; S.D. Codified Laws §§ 35-4-66, 35-4-67; Tenn. Code Ann. § 57-3-402; Tex. Alco. Bev. Code Ann. § 107.05; Utah Code Ann. §§ 32A-8-201, 32A-8-301; Va. Code Ann. § 4.1-310; Wyo. Stat. Ann. §§ 12-2-203, 12-3-101.

this regulation dealing with any commodity other than alcohol, it would be subject to the Court's traditional dormant Commerce Clause analysis. That analysis requires the State to show a compelling interest and that the interest could not be served as well by available nondiscriminatory means. See *Maine v Taylor*, 477 U.S. 131, 138 (1986). While the States' interests are indeed compelling and regulations such as this would satisfy traditional dormant Commerce Clause analysis, even applying this analysis is inappropriate because the Twenty-first Amendment makes alcohol constitutionally unique.

The States have a compelling reason for treating out-of-state producers differently from their in-state counterparts. In particular, locality matters for enforcement purposes. In-state wineries are plainly subject to a State's regulations and enforcement powers. They are subject to all inspections, subpoenas, taxes, record retention requirements, and license sanctions that the State may impose. If an in-state winery violates State law, its license to sell or manufacture wine can be suspended or revoked. The winery may be fined. And no matter what the discipline issued, the State can be sure the discipline is enforced.

With out-of-state wineries, none of the regulatory safeguards exist. If an out-of-state winery is ordered to suspend sales, States cannot enforce this suspension, nor can they enforce a revocation or fine. States are unable to inspect out-of-state wineries for possible health violations or adulterated liquor. And States are unable to enforce collection of alcohol taxes against out-of-state wineries that ship directly to consumers. Thus, States have only two choices: restrict direct shipments by out-of-state wineries or leave this potentially dangerous product virtually unregulated as long as it is shipped directly to a consumer from out of state.

As this Court has noted, "[a]s long as a State does not needlessly obstruct interstate trade or attempt to 'place itself in a position of economic isolation' [citation omitted] it retains broad regulatory authority to protect the health and safety of its citizens . . . ." *Maine v. Taylor*, 477 U.S. at 151. It is health and safety concerns, not economic isolationism, that drive regulations like those here. State legislatures examined the potential harm to their residents when they decided to regulate direct shipment of alcohol to consumers. Enforcement powers against wineries located within their borders help the States to ensure that the health, welfare, and safety of the citizens, as well as the other core Twenty-first Amendment concerns, are achieved.

Requiring accountability in liquor distribution is a valid interest recognized by this Court and others. In *Heublein, Inc. v. South Carolina*, 409 U.S. 275, 277 (1972), South Carolina required all alcohol producers shipping alcohol into the State to have a resident representative in the State. Such a requirement did not violate the Commerce Clause, because "by requiring manufacturers to localize their [alcohol] sales, South Carolina establishes a check on the accuracy of these records." *Id.* at 282. "The requirement that sales be localized is, unquestionably, reasonably related to the State's purposes . . . ." *Id.* at 283. Similarly, requiring out-of-state wineries to "localize" their sales is unquestionably reasonably related to the States' control of their liquor distribution systems. See also *Kronheim v. District of Columbia*, 91 F.3d 193 (D.C. Cir. 1996) (upholding local warehousing regulation designed to advance a core enforcement purpose of the Twenty-First Amendment and combat the perceived evils of unrestricted traffic in liquor upheld). As the Second Circuit recently noted, "presence ensures accountability." *Swedenburg v. Kelly*, 358 F.3d 223, 237 (2nd Cir. 2004). The State restrictions at issue here, by

limiting the ability of out-of-state wineries to ship directly to consumers, likewise attempt to achieve accountability by requiring a localized presence.

Requiring an out-of-state winery to ship its product through a locally-licensed entity such as a wholesaler, gives the State a needed avenue of enforcement. But requiring an in-state winery to also sell through a local wholesaler would impose an unnecessary and artificial restriction on the market. The in-state winery is already accountable. The Second Circuit correctly recognized this distinction in *Swedenburg*: "New York has chosen to relax its regulatory grip for wineries to sell directly to consumers. It has not barred out-of-state wineries from the opportunity; it has correlated its relaxation of regulatory scrutiny with a safety net ensuring accountability-presence." 358 F.3d 223, 238; See also *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 850 (7th Cir. 2000) ("laws forbidding purchases from sellers that lack Indiana permits are devilishly difficult to enforce"); *Kronheim & Co., Inc. v. District of Columbia*, 91 F.3d 193, 203-04 (D.C. Cir. 1996) (legitimate state interests would be supported by requiring geographic proximity of the warehouses). In short, allowing in-state wineries to ship directly, but not out-of-state wineries, is a valid distinction based on the enforcement interest that is supported by having a localized presence.

The States should be left to properly determine how best to protect their consumers. "The State may protect her people against evil incident to intoxicants and may exercise large discretion as to means employed." *Ziffrin*, 308 U.S. at 138-39. Discriminatory legislation is permissible if that "discrimination is demonstrably justified by a valid factor unrelated to economic protectionism." *Healy*, 491 U.S. at 340-41. Here, any discrimination regarding direct shipment of alcohol is justified by a valid factor. These valid interests are unrelated to economic protection: the preservation of the

State's duty to protect the health, safety, and well being of its residents. The State regulations concerning direct shipment of alcohol permit out-of-state wineries to participate in the State market, while still preserving the State's strong interest in regulating alcohol distribution.

II. The Webb-Kenyon Act also authorizes States to regulate the flow of alcohol for use within their territories, so the dormant Commerce Clause does not bar these State regulations.

The State regulations here withstand a dormant Commerce Clause challenge for another reason as well—Congress has expressly authorized State regulation. The Commerce Clause grants to Congress the power to regulate commerce among the several States. Where Congress has not acted, of course, the dormant Commerce Clause limits a State's ability to economically isolate itself or impede the free flow of interstate commerce. But, where Congress has acted, the starting point for analyzing State regulations must be the language of the relevant federal act. The relevant federal statute here is the Webb-Kenyon Act, 27 U.S.C. § 122. And under that statute, the State regulations at issue here are valid.

The Webb-Kenyon Act, 27 U.S.C. § 122, expressly confirms the States' authority over liquor importation. That act, originally adopted in 1913 and re-enacted in 1935, states: "The shipment or transportation . . . of any . . . vinous . . . intoxicating liquor . . . into any state . . . to be . . . sold . . . in violation of any law of such state . . . is prohibited." The Commerce Clause is not dormant in the area of alcohol shipping among the States; rather, Congress has expressly authorized the States to regulate alcohol shipping. Thus, not only does the text of the Twenty-first Amendment authorize the States to determine how alcohol will be imported across

their borders for use therein, but also Congress has taken the additional step of enacting legislation that complements (and reinforces) the Twenty-first Amendment.

Moreover, Congress has the authority to empower States in this manner. As the Court has explained, "It is equally clear that Congress may 'redefine the distribution of power over interstate commerce' by '[permitting] the states to regulate the commerce in a manner which would otherwise not be permissible.'" *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 88-89 (1984). In the area of insurance, for example, Congress has transferred *exclusive* authority to regulate to the States, notwithstanding the fact that insurance is an item of interstate commerce. See *Western & Southern Life Insurance Co. v. State Board of Equalization*, 451 U.S. 648, 652-55 (discussing McCarran-Ferguson Act).

Similarly, Congress, by enacting Webb-Kenyon, removed any doubt as to the States' power to determine how intoxicating liquor would be permissibly shipped into the States. The Webb-Kenyon Act does not pre-empt State regulation of alcohol shipments. Nor does it so completely "occupy the field" of liquor regulation so as to leave no room for State regulation. Instead, by prohibiting alcohol shipments into a State that are contrary to State law, Congress exercised its Commerce Clause power to expressly empower the States to regulate. The Commerce Clause is not dormant here; it is expressly on the States' side.

Consequently, State restrictions on alcohol imports are valid exercises of the power bestowed upon the States by both the Twenty-first Amendment and the Webb-Kenyon Act. As the regulations do not conflict with a federal exercise of Commerce Clause authority, they survive a dormant Commerce Clause analysis.

III. The regulations here fall well within the States' police power, as they impose only minor limitations on imports that are entirely justified by the dangers that unrestricted alcohol shipments present.

After Prohibition ended, States aggressively regulated alcohol sales and shipments along with the time and place of consumption. While States have adopted varying approaches to alcohol regulation, most use some form of a three-tier distribution, as Michigan does. In specifically analyzing one such three-tier distribution system, the court noted, "the State has established a comprehensive system for the distribution of liquor within its borders. That system is unquestionably legitimate." *North Dakota v. United States*, 495 U.S. 423, 432 (1990). In short, the States have extensive power to regulate, as they see fit, their internal commerce in liquor.

The Twenty-first Amendment, Webb-Kenyon, and the States' inherent police power all authorize State regulation of how alcohol flows into the State. "While the States, vested as they are with general police power, require no specific grant of authority in the Federal Constitution to legislate with respect to matters traditionally within the scope of the police power, the broad sweep of the Twenty-first Amendment has been recognized as conferring something more than the normal state authority over public health, welfare, and morals." *California v. LaRue*, 409 U.S. 109, 114 (1972). See also *Rice v. Rehner*, 463 U.S. 713, 724 (1983) (noting the State's unquestionable interest in the liquor traffic that occurs within its borders, independent of the authority conferred on the States by the Twenty-first Amendment). Under these settled principles, the significant dangers presented by the unregulated shipment of alcohol into a State more than justify the import restrictions embodied in the regulations here.

A. The regulations here do not prevent access to State markets or State consumers, and wineries have no right to demand specific methods of access, such as internet sales and direct shipment.

This case is not about whether out-of-state wineries are cut off from in-state consumers, as out-of-state wineries may, and do, sell wine in foreign States. The dispute centers on whether the out-of-state wineries will sell and ship wine to foreign States using the specific methods the wineries demand, or whether the sale and shipment will occur under the laws, regulations, and distribution systems the States establish. State regulation that allows in-state, but not out-of-state, wineries to directly ship to consumers comports with the States' authority to require that all alcohol in the intrastate market be purchased from entities over which the State has significant regulatory control. See *North Dakota*, 495 U.S. at 447 (Scalia, J. concurring). This system advances the States' legitimate interests under the Twenty-first Amendment and is well within the States' police powers.

Out-of-state wineries may sell their wine in many different States and have several methods of participation from which to select. Out-of-state wineries may participate in the traditional three-tier system by selling to in-state wholesalers. They may establish a presence in certain States and obtain State retail permits. Also some States allow direct shipment if the product is unavailable within the State and the product is shipped either to a licensed retailer (Pennsylvania) or directly to the consumer (Ohio). Several States provide for an "on-site" visit or other exception to the restriction on direct shipment. Under these exceptions, State residents are permitted to have certain amounts of alcohol shipped directly or personally transported to their homes, if State requirements are met. Almost all of the States that restrict the shipment of wine from out-of-state wineries also

place limits on the amount consumers are allowed to receive during a given period.[4] As these shipments are for personal use only, and are not for resale purposes, these volume limitations are again an example of the States' strong interest in controlling the flow of alcohol into the State. Unrestricted direct shipments from out-of-state wineries would severely impact the States' abilities to enforce the volume limitations that are already in place.

The out-of-state wineries seek to sell their wine through a particular method of operation in a retail market—internet sales and direct shipment to consumers. But the Commerce Clause does not give the wineries a right to sell through any method they like. "Not all intentional barriers to interstate

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[4] Connecticut: Conn. Gen. Stat. § 12-436 (2003) allows for up to 4 gallons; Delaware: Del. Code Ann. It. 4, § 716 (2004) allows up to 1 liter; Florida: Fla. Stat. § 562.15 (2004) allows up to 1 gallon; Georgia: Ga. Code Ann. § 3-6-32 (2002) allows 5 cases; Hawaii: Haw. Rev. Stat. Ann. § 281-33.1 (2003) allows 5 gallons; Indiana: Ind. Code Ann. § 7.1-5-11-15 (2004) allows up to 1 quart; Maine: Me. Rev. Stat. Ann. Tit. 28, § 2077 (2003) allows up to 1 gallon; Massachusetts: Mass. Gen. Laws ch. 138, § 22 (2004) allows up to 3 gallons; Michigan: Mich. Comp. Laws Ann. § 436.1203.7 312 oz. personal transport; Montana: Mont. Code Ann. § 16-6-301 (2003) allows up to 3 gallons on your person (this would be different from amounts allowed to a consumer who has a connoisseur's permit see, Mont. Code Ann. § 16-4-901 (2003)); New Jersey: N.J. Stat. Ann. § 33:1-2 (2004) allows up to 1 gallon; North Carolina: N.C. Gen. Stat. § 18B-109 (2004) and 4 N.C. Admin. Code tit. 2, R.1801 (2004) up to 5 liters; Ohio: Ohio Admin. Code § 4301:1-1-23 allows 15 gallons per household per quarter; Oklahoma: Okla. Stat. tit. 37, § 537 (2004) allows up to 1 liter; South Carolina: S.C. Code Ann. § 61-4-745 (2003) allows up to 2 cases per month; South Dakota: S.D. Codified Laws § 35-12A-3 (2003) allows up to 12 cases of wine per year; Tennessee: Tenn. Code Ann. § 57-3-401 (2004) allows up to 1 gallon; Texas: Tex. Alco. Bev. Code Ann. § 107.07 (2004) allows up to 3 gallons personal transport; Vermont: Vt. Stat. Ann. Tit 7, § 63 (2003) allows up to 6 gallons personal transport, no limit on direct ship; Virginia: Va. Code Ann. § 4.1-112.1 (2004) allows up to 2 cases per month.

trade are protectionist, however, and the Commerce Clause 'is not a guaranty of the right to import into a state whatever one may please, absent a prohibition by Congress, regardless of the effects of the importation upon the local community.'" *Maine v. Taylor*, 477 U.S. 131, 149 n.19 (1986). See also *Exxon v. Maryland*, 437 U.S. 117, 127 (1978) ("We cannot, however, accept appellants' underlying notion that the Commerce Clause protects the particular structure or methods of operation in a retail market.") The decision to allow in-state wineries to directly ship is a legislative decision made on a State-by-State basis, best left to the state legislatures as consistent with the text of the Twenty-first Amendment.

B. The growth of the internet and e-commerce threatens the States' ability to enforce their liquor laws and preserve a safe and orderly market in alcohol.

Enforcement of State liquor laws against out-of-state entities is a very real problem, as is the sale and shipment to minors by these out-of-state entities. Internet access to alcohol is not a phantom problem. On the internet, alcohol websites are offering a "cyber playground" for underage youths. A study by the Center on Alcohol Marketing and Youth at Georgetown University revealed that alcohol websites received 700,000 visits by underage people from July through December 2003. See *Clicking with Kids: Alcohol Marketing and Youth on the Internet*, Center on Alcohol Marketing and Youth http://www.camy.org/research/ (visited July 21, 2004). The study revealed that 13% of all visitors to 55 alcohol company websites were under the age of 21. Even though the sites generally require age verification, that "verification" consists simply of asking the user if she is 21. But of course, there is no way to verify the user's truthfulness. *Id.*

Allowing internet sales of a highly dangerous and highly regulated product, such as alcohol or tobacco, is a genuine concern for State regulators. Thus, the Court may fairly consider whether invalidation of State liquor laws will leave States unable to adequately enforce their laws for the protection of their residents. Internet sales and direct shipment from out-of-state wineries significantly undermine the States' ability to prevent underage access to alcohol and significantly impair the collection of sales and excise tax.

1. Unrestricted out-of-state shipment directly to consumers would impede States' efforts to prevent minors from obtaining alcohol.

The Massachusetts Attorney General recently completed an undercover investigation of out-of-state online alcohol retailers, and not surprisingly, it got results. The Attorney General is now suing four online retailers for selling to underage buyers in Massachusetts. Three other online alcohol retailers face administrative actions. See http://www.ago.state.ma.us/sp.cfm?pageid=986&id=1241 (visited July 19, 2004). In each case, underage college students were able to order beer, wine, and hard liquor—without having to verify their age—and the underage buyers had it shipped to them. *Id.* A previous Massachusetts sting conducted by the Massachusetts Alcohol Beverages Control Commission in 2002 yielded similar results. *Id.* See also *The Electronic Frontier: The Challenge of Unlawful Conduct Involving the Use of the Internet*, A Report of the President's Working Group on Unlawful Conduct on the Internet (March 2000) Appx. G (noting that the primary issue concerning the on-line alcohol sales is the difficulty sellers have in determining whether a purchaser is underage.) These examples show why many States are reluctant to allow out-of-state wineries to ship directly to consumers.

Similar concerns recently led the Second Circuit to uphold a New York statute that bans direct shipment of cigarettes to consumers. *Brown & Williamson v. Pataki*, 320 F.3d 200 (2nd Cir. 2003). The court held that the legislature rightly determined that cigarettes sold over the internet or by telephone or mail order pose a serious threat to public health, safety, and welfare. *Id.* at 204. "Sales accomplished through direct shipment made the verification of the purchaser's age difficult and that existing penalties for cigarette bootlegging were inadequate." *Id.* Because of these concerns, the court rejected the dormant Commerce Clause challenge and held that the regulation of importation of cigarettes was a legitimate exercise of the State power in the public interest. *Id.* at 217. As with restrictions on cigarette sales, the States' restrictions on direct shipments by out-of-state wineries likewise protect the public interest and are likewise a legitimate exercise of State power. Such restrictions do not violate the dormant Commerce Clause.

2. Direct shipment interferes with the States' ability to collect legitimate sales and excise taxes, which are significant sources of State revenue.

Along with the States' interests in preventing sales to minors and maintaining an orderly market, States also share an interest in regulating liquor markets to ensure proper tax collection. States have made the legislative decision that limiting, restricting, or completely banning out-of-state wineries from shipping directly to consumers serves these tax collection interests. As the GAO study noted, non-reporting of internet sales by internet vendors can significantly affect State sales tax receipts. Staff of the GAO, *Internet Cigarette Sales: Giving ATF Investigative Authority May Improve Reporting and Enforcement* GAO-02-743 (August 2002) at 11.

The States' experience with internet cigarette vendors illustrates the difficulty of collecting sales and excise taxes on direct shipments that bypass the State system. Internet cigarette vendors do not comply with the tax reporting requirements of the Jenkins Act. General Accounting Office, GAO-02-743, Internet Cigarette Sales (2002). The GAO reviewed 147 website addresses for internet cigarette vendors in the United States and not one site posted information that indicated the vendors complied with the Jenkins Act. GAO-02-743 at pp. 3, 4. "Conversely, information posted on 78 percent of the websites indicated the vendors do not comply with the Act. " *Id.* at 4.

Nor can States rely on cigarette buyers, rather than sellers, to remit taxes. To be sure, consumers who buy cigarettes over the internet from out-of-state vendors are liable for their own State's sales tax. *Id.* But, despite a detailed federal regulation requiring reporting of information, officials from the nine states noted in the GAO study all expressed concern over the Internet cigarette vendors' noncompliance with the Jenkins Act and the resulting loss of State sales tax revenue. *Id.* at 11. California estimated a loss of approximately $13 million in tax revenue during a 30-month period. *Id.*

The States have little reason to expect that we will have better luck taxing online alcohol sales than we have had with cigarette sales. Indeed, in a direct-shipping world, the State may have no way to collect a sales tax from the winery at all. See *Quill Corp. v. North Dakota*, 504 U.S. 298, 315-18 (1992) (holding that Commerce Clause bars imposition of sales tax where only contact between out-of-state entity and in-state consumer is internet ordering and direct shipment). Conversely, by requiring out-of-state wineries and other alcohol providers to participate in the three-tier distribution system, States are able to collect legitimate sales and excise taxes.

Moreover, taxes on liquor are a vital source of revenue. The table attached as Appendix B lists the State wine excise tax rates for each State. The table in Appendix C provides the amounts of sales and excise taxes that each State collected in fiscal year 2001. These amounts range from a high of $545.48 million in Florida to $1.34 million in Wyoming. States rely on these revenues, so underreporting of sales and use taxes by individuals costs the States. Thus, many States rely on the three-tier system for the efficient collection of taxes due the State.

Again, States' revenue concerns are not alleviated by any suggestion that we may rely on individual consumers to remit sales and excise taxes, as we have already seen how tax revenues escape when online sales grow. The Government Accounting Office Report on sales taxes and electronic commerce reported, "use tax compliance by individual purchasers (for all purchases, not just those over the internet) was extremely low—on the order of 0 to 5 percent." General Accounting Office, GAO/GGD/OCE-00-165, *Sales Taxes: Electronic Commerce Growth Presents Challenges; Revenue Losses Are Uncertain* (June 2000) at 17. A Congressional Budget Office paper also noted this threat: "[T]he administrative costs of use taxes paid by purchasers are relatively high and the rate of collections is quite low." Economic Issues in Taxing Internet and Mail-Order Sales, Congressional Budget Office paper (Oct. 2003) at 3, *available at* www.cbo.gov/showdoc.cfm?index+=4638. One estimate is that the State of Florida alone may lose between $321 million and $1.28 billion in taxes on remote sales in 2003. See GAO Sales Taxes Report at App. V. "[S]tates have insuperable problems collecting their use taxes when people buy from out-of-state vendors that do not collect sales taxes. Noncompliance is almost impossible to detect, and rampant civil disobedience ensures that a handful of prosecutions would not be effective. Private gains from violating the laws vastly exceed the anticipated legal

penalties." *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 850 (7th Cir. 2000). Requiring out-of-state wineries to sell through wholesalers that are present in the State is a legitimate response to these concerns.

IV. If this Court determines that, notwithstanding the express text of the Twenty-first Amendment, the dormant Commerce Clause applies to State regulations governing importation of alcohol into the State, then the Court should use a rational basis test for its Commerce Clause analysis.

The States freely admit that regulations such as those at issue here treat out-of-state wineries differently from in-state wineries with regard to the ability to directly ship to in-state consumers. Under traditional dormant Commerce Clause principles (*i.e.*, those applicable to non-alcohol products), then, these statutes would constitute virtually *per se* violations, which this Court has subjected to the strictest scrutiny. But for all the reasons above, those traditional dormant Commerce Clause principles simply do not apply, because this discrimination in regulating alcohol rests squarely on both the text of the Twenty-first Amendment and the congressional authorization for state regulation reflected in the Webb-Kenyon Act. However, if the Court rejects these arguments, and finds that the dormant Commerce Clause does apply, then the *amici* States argue in the alternative that such Commerce Clause analysis should be adjusted to reflect the unique protection for state alcohol regulations embodied in the Twenty-first Amendment. Specifically, we propose two changes to dormant Commerce Clause analysis of such regulations. First, the standard Commerce Clause rule—that statutes that discriminate on their face against out-of-state entities are virtually *per se* violations of the dormant Commerce Clause—should not apply. Second, the Court should apply a rational basis test,

not the traditional *Pike* balancing test used for other articles of commerce. *Pike v. Bruce Church Inc.*, 397 U.S. 137 (1970).

First, the Court should not apply traditional Commerce Clause analysis without any alcohol-specific adjustment, because if the Court were to simply treat alcohol like any other product, then the Twenty-first Amendment would be reduced to a nullity. Respondents urge the Court to treat alcohol just like butter or any other item that moves in commerce. This approach, however, ignores both the Twenty-first Amendment and the Court's precedent, as both acknowledge that alcohol is, in fact, constitutionally different. Given the express language of the Twenty-first Amendment, the Court should, at the very least, acknowledge the interests recognized there. A virtually *per se* prohibition on facially discriminatory regulations, or any approach that would require State laws to pass strict scrutiny to survive, would not adequately reflect the States' interests in liquor control.

Similarly, the traditional *Pike* balancing test also fails to give due deference to the State authority granted by the Twenty-first Amendment. The *Pike* test balances the burden a regulation imposes on commerce against the putative local benefits. That test should not be applied to alcohol import regulations either, as simply applying the *Pike* balancing test would essentially treat alcohol like every other article of commerce. Nor would it be enough to recognize the States' interest within the *Pike* framework by granting greater weight to the State-interest side of the scale where alcohol is involved. That thumb-on-the-scale approach has already been adopted for dangerous products such as cigarettes. See *Brown & Williamson v. Pataki*, 320 F.3d 200, 217. So alcohol would undoubtedly warrant such treatment even

without the Twenty-first Amendment. Consequently, adopting such an approach would not fully honor alcohol's constitutionally unique status.

Because none of the other Commerce Clause tests are appropriate, the States submit that—if the Commerce Clause is to apply here at all—the Court should adopt a standard that recognizes the constitutionally-unique nature of alcohol regulation. In particular, the Court should defer to the States' compelling interest in regulating alcohol imports for use in the State and uphold such import regulations as long as there is "any reasonably conceivable set of facts" that shows a rational basis for treating out-of-state wineries differently from those in-state. See *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993). Such a rational-basis standard would acknowledge the constitutionally-unique character of alcohol, the States' compelling interest in controlling the flow of alcohol into their borders for use or consumption, and Congress's power to regulate the free flow of commerce.

CONCLUSION

The judgment of the Court of Appeals for the Sixth Circuit should be reversed.

Respectfully submitted,

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SUPPLEMENTAL MATERIALS

APPENDIX A

1. Reciprocity States - Allow direct shipments only from States that afford the reciprocal privilege.

California
Colorado
Hawaii
Idaho
Illinois
Iowa
Minnesota
Missouri
New Mexico
Oregon
Washington
West Virginia
Wisconsin

2. Limited Personal Import States - Allow direct shipment of alcohol in limited amounts if certain State requirements are met.

Alabama
Alaska
Arizona
Connecticut
Delaware
Florida
Georgia
Louisiana
Michigan
Nebraska
Nevada
New Hampshire
New Jersey

North Carolina
Ohio
Oklahoma
Pennsylvania
Rhode Island
South Carolina
Vermont
Virginia
Wyoming

3. Express Prohibition States - Simply ban all direct shipments of alcohol.

Arkansas
Indiana
Kansas
Kentucky
Maine
Massachusetts
Maryland
Mississippi
Montana
New York
North Dakota
South Dakota
Tennessee
Texas
Utah

Source: See, Vijay Shankar, Note, *Alcohol Direct Shipment Laws—the Commerce Clause, and the Twenty-first Amendment*, 85 Va.L.Rev. 353, 356-57, n.20, 22, 24 (1999) (States have been re-classified from what appears in the note due to statutory changes since 1999; these classifications represent legislative restrictions and may not reflect how laws are currently being enforced due to pending litigation).

APPENDIX B

STATE ALCOHOL EXCISE TAX COLLECTIONS BY STATE – FISCAL YEAR 2001
($Thousands)

State	2001
Total	$4,181,160
Alabama	$ 128,848
Alaska	12,003
Arizona	51,406
Arkansas	29,121
California	288,451
Colorado	30,439
Connecticut	47,328
Delaware	11,611
Florida	545,488
Georgia	140,367
Hawaii	37,782
Idaho	6,057
Illinois	140,643
Indiana	33,078
Iowa	12,209
Kansas	77,896
Kentucky	69,876
Louisiana	52,392
Maine	40,900
Maryland	24,522
Massachusetts	64,793
Michigan	136,591
Minnesota	60,610
Mississippi	39,256
Missouri	25,912
Montana	17,541

Nebraska	17,290
Nevada	16,468
New Hampshire	11,462

STATE ALCOHOL EXCISE TAX COLLECTIONS BY STATE – FISCAL YEAR 2001
($Thousands)

State	2001
New Jersey	79,889
New Mexico	34,738
New York	179,157
North Carolina	199,844
North Dakota	4,892
Ohio	81,029
Oklahoma	61,994
Oregon	12,616
Pennsylvania	187,662
Rhode Island	9,450
South Carolina	137,429
South Dakota	11,070
Tennessee	78,471
Texas	541,305
Utah	25,020
Vermont	15,386
Virginia	127,638
Washington	168,777
West Virginia	8,197
Wisconsin	44,907
Wyoming	1,349

Source: Compiled from information found at http://www.taxfoundation.org/statealcoholtaxes (last visited on July 29, 2004).

APPENDIX C

STATE WINE EXCISE TAX RATES

January 1, 2004

STATES	EXCISE TAX RATES ($per gallon)	SALES TAXES APPLIED	OTHER TAXES
Alabama	$1.70	Yes	Over 14% - sold through state store
Alaska	$2.50	n.a.	
Arizona	$0.84	Yes	
Arkansas	$0.75	Yes,	under 5% - $0.25/gallon; $0.05/case; and 3% off- and 10% on-premise
California	$0.20	Yes	Sparkling wine - $0.30/gallon
Colorado	$0.32	Yes	
Connecticut	$0.60	Yes	Over 21% and sparking wine - $1.50/gallon
Delaware	$0.97	n.a.	
Florida	$2.25	Yes	Over 17.259% - $3.00/gallon, sparking wine $3.50/gallon 6.67¢/4 ounces on-premise retail tax
Georgia	$1.51	Yes	Over 14% - $2.54/gallon; $0.83/gallon local tax
Hawaii	$1.36	Yes	Sparkling wine - $2.09/gallon and wine coolers - $.084/gallon

Idaho	$0.45	Yes	
Illinois	$0.73	Yes	Over 20% - $4.50/gallon; $0.30/gallon in Chicago and ($0.16-$0.30)/gallon in Cook County
Indiana	$0.47	Yes	Over 21% - $2.68/gallon
Iowa	$1.75	Yes	Under 5% - $0.19/gallon
Kansas	$0.30	No	Over 14%-$0.75/gallon; 8% off- and 10% on-premise
Kentucky	$0.50	Yes*	9% wholesale
Louisiana	$0.11	Yes	14% to 24% - $0.23/gallon, over 24% and sparkling wine- $1.59/gallon
Maine	$0.60	Yes	Over 15.5% - sold through state stores, sparkling wine - $1.25/gallon; additional 5% on-premise sales tax
Maryland	$0.40	Yes	
Massachusetts	$0.55	Yes*	Sparkling wine - $0.70/gallon;
Michigan	$0.51	Yes	Over 16% - $0.76/gallon
Minnesota	$0.30	--	14% to 21% - $0.95/gallon, under 24% and sparkling wine - $1.82/gallon; over 24% - $3.52/gallon; $0.01/bottle (except miniatures) and 9.0% sales tax
Mississippi	$0.35	Yes	Over 14% and sparkling wine – sold through the state
Missouri	$0.36	Yes	

Montana	$1.06	n.a.	Over 16% - sold through state stores
Nebraska	$0.95	Yes	
Nevada	$0.70	Yes	14% to 22% - $1.30/gallon, over 22% - $3.60/gallon
New Hampshire	See footnote (1)	n.a.	
New Jersey	$0.70	Yes	
New Mexico	$1.70	Yes	Over 14% - $6.06/gallon
New York	$0.19	Yes	
North Carolina	$0.79	Yes	Over 17% - $0.91/gallon
North Dakota	$0.50	--	Over 17% - $0.60/gallon, Sparkling wine - $1.00/gallon; 7% state sales tax
Ohio	$0.32	Yes	Over 14% - $1.00/gallon, vermouth - $1.10/gallon and sparkling wine - $1.50/gallon
Oklahoma	$0.72	Yes	Over 14% - $1.144/gallon, sparkling wine - $2.08/gallon; 13.5% on-premise
Oregon	$0.67	n.a.	Over 14% - $0.77/gallon
Pennsylvania	See footnote (1)	Yes	
Rhode Island	$0.60	Yes	Sparkling wine - $0.75/gallon
South Carolina	$0.90	Yes	$0.18/gallon additional tax

South Dakota	$0.93	Yes	14% to 20% - $1.45/gallon, over 21% and sparkling wine – $2.07/gallon; 2% wholesale tax
Tennessee	$1.21	Yes	$0.15/case and 15% on-premise
Texas	$0.20	Yes	Over 14% - $.408/gallon and sparkling wine - $0.516/gallon; 14% on-premise and $0.05/drink on airline sales
Utah	See footnote (1)	Yes	
Vermont	$0.55	Yes	Over 16% - sold through state store, 10% on-premise sales tax
Virginia	$1.51	Yes	Under 4% - $0.2565/gallon and over 14% - sold through state store
Washington	$0.87	Yes	Over 14% - $1.72/gallon
West Virginia	$1.00	Yes	5% local tax
Wisconsin	$0.25	Yes	Over 14% - $0.45/gallon
Wyoming	See Footnote (1)	Yes	
Dist. Of Columbia	$0.30	Yes	8% off – and 10% on-premise sales tax, over 14% - $0.40/gallon and Sparkling - $0.45/gallon

U.S. Median	$0.64		

Source: Compiled by FTA from various sources, See http://www.taxadmin.org/fta/rate/wine.html (visited July 24, 2004)

** Sales tax is applied to on-premise sales only.*

(1) All wine sales are through state stores. Revenue in these states is generated from various taxes, fees and net profits.

Case Nos. 03-1116 and 03-1120

Supreme Court, U.S.
FILED
SEP 23 2004
OFFICE OF THE CLERK

- IN THE

United States Supreme Court

GRANHOLM, et al. and MICHIGAN BEER & WINE WHOLESALERS ASS'N,

Petitioners,

v.

ELEANOR HEALD, *et al.*,

Respondents.

On Writ of Certiorari To The United States Court of Appeals for the Sixth Circuit

BRIEF FOR WINEAMERICA, COALITION FOR FREE TRADE, FAMILY WINEMAKERS OF CALIFORNIA, STATE VINTNERS ASSOCIATIONS AND GRAPE GROWING ASSOCIATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Does a state's regulatory scheme that permits in-state wineries directly to ship alcohol to consumers but restricts the ability of out-of-state wineries to do so violate the dormant Commerce Clause in light of Section Two of the Twenty-first Amendment?

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INTEREST OF THE *AMICI*

WineAmerica, Inc., the National Association of American Wineries ("WineAmerica"), appears on behalf of more than 800 member wineries from 48 states. WineAmerica represents the interests of American wineries and promotes the advancement of the wine industry.[1] WineAmerica opposes protectionist state laws, which prevent its members from selling their wine across the country.

The following *amici* are trade associations and other organizations representing the interests of wineries: Arizona Winegrowers Association, Association of Maryland Wineries, Coastal Wineries of Southeastern New England, Colorado Wine Industry Development Board, Connecticut Vineyard & Winery Association, Family Winemakers of California, Idaho Grape Growers and Wine Producers Commission, Illinois Grape Growers and Vintners Association, Indiana Winegrowers Guild, Iowa Wine Growers Association, Long Island (NY) Wine Council, Louisiana Winery Association, Massachusetts Winegrowers Association, Missouri Grape & Wine Program, Missouri Vintners Association, North Carolina Winegrowers Association, Oklahoma Grape Growers and Wine Makers Association, Oregon Winegrowers Association, Professional Winemakers Association of Arizona, Rocky Mountain (CO) Association of Vintners & Viticulturists, Seneca Lake (NY) Winery Association, Small Wineries of New York, South Dakota Specialty Producers Association, Vinifera Wine Growers Association, Virginia Wineries Association, Walla Walla Valley (WA) Wine Alliance, Washington Wine Institute, Winegrowers Association of Georgia, WineMichigan, Yadkin Valley (NC) Winegrowers Association.

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[1] In accord with this Court's Rule 37.6, *amici* state that no counsel for party authored this brief in whole or in part, and no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.3, *amici* state that Petitioners and Respondents granted consent to the filing of this brief.

The following *amici* are trade associations and other organizations representing the interests of grape growers: Allied Grape Growers; California Association of Winegrape Growers; California Farm Bureau Federation; Connecticut Farm Bureau; Connecticut Farm Winery Development Council; Florida Grape Growers Association; Indiana Farm Bureau Inc.; Maryland Grape Growers Association; New York Farm Bureau, Inc.; North Carolina Grape Council; Virginia Farm Bureau Federation; Washington Association of Wine Grape Growers; Winegrape Growers of America.

The Coalition for Free Trade ("CFT") is a non-profit organization dedicated to promoting the right to ship wine directly to consumers throughout the United States. CFT's Board of Trustees is comprised largely of wineries, and the resolution of this matter will affect these wineries' businesses. CFT has a vital interest in preserving the free flow of American wine in interstate commerce.

SUMMARY OF ARGUMENT

This Court has repeatedly acted to further the framers' original vision that the many states, while sovereign, should be united in a single national market, and has applied the dormant Commerce Clause to invalidate protectionist State laws discriminating against businesses in other states. Yet this vision of a more perfect Union remains unrealized for Americans who make and drink wine. Many states, including Michigan, prohibit wineries in other states from shipping their products directly to consumers; instead, they compel out-of-state wineries who wish to sell their wines to consumers to subject themselves to the whims of cartel-like distribution systems. Presenting wineries with daunting economic constraints, and distributors with little incentive to serve wineries' needs, these systems effectively prevent consumers in these states from buying most of the wine labels in this country. By contrast, these states typically

allow wineries within their borders to ship directly to consumers. In Michigan, the practical effects of this scheme limit access to the Michigan wine market to a small number of the largest wine producers and prevent Michigan residents from buying most of the different wines made in this country unless they visit the wineries where those wines are made.

The State of Michigan and other litigants argue that Section Two of the Twenty-first Amendment trumps the dormant Commerce Clause and gives Michigan and other states free rein to erect discriminatory barriers to out-of-state wineries. But this Court has ruled that the Twenty-first Amendment does not give States *carte blanche* to adopt protectionist measures. *See Bacchus Imports v. Dias*, 468 U.S. 263 (1984). Michigan's discriminatory barriers are clearly protectionist in nature and deprive most out-of-state wineries of their ability to sell wines to Michigan residents. Such discrimination cannot be justified by the states' legitimate interests under the Twenty-first Amendment.

In accord with the vision of the framers, this Court should affirm the Sixth Circuit and hold that Michigan's restrictions on direct shipping of wine to Michigan consumers by out-of-state wineries is unconstitutional.

ARGUMENT

"The discovery of a wine is of greater moment than the discovery of a constellation. The universe is too full of stars."

—*Benjamin Franklin*

I. AMERICA'S SMALL WINERIES MEET CONSUMERS' INCREASING PREFERENCES FOR A WIDE VARIETY OF DIFFERENT WINES.

A. Small Wineries Confront A Host Of Challenges In Bringing Wines To Market.

For multi-generational grape growers, family farmers, optimistic entrepreneurs, and even the occasional dilet-

tante, the business of running a winery is a labor of love for the rocky soil, the oaken barrel, and the tinted bottle. Making wine is not for the faint of heart, nor the soft of hand—it is a risky, backbreaking business that requires years of detailed planning and deferred gratification. On top of these physical and mental challenges, winemakers discover when it comes time to sell their produce that they must also overcome the obstacles of discriminatory state laws which exclude them from the market in many states.

The first challenge that would-be vintners face is monetary. On average, starting a winery requires two million dollars. Nor are there any immediate returns to cover loan payments, fund continuing expenses, hire labor, or roll out advertising. Long after the first harvest, their mixture of crushed grapes, sugar and yeast must ferment and age in barrels for up to several years. Accordingly, winemakers find it difficult to finance their businesses, where the first drop of profit will not arrive for years after the first bank payments are due.

The second challenge is to cultivate the grapes. Like any farmer, the winemaker faces a barrage of hazards: from animals and insects—such as gophers, glassy-winged sharpshooters (a fantastically named pest that can decimate entire vineyards), deer, and wild turkeys—to frost, drought, and other calamities. The grape farmer must also don the hat of a geologist to assess the soil to decide when and how to plant; adopt the mind of a botanist to choose when to sow and when to reap; and assume the clipboard of a manager to hire and supervise labor and negotiate with suppliers. Between August and October, the grapes must be harvested during the cool night in order to keep freshly picked grapes from fermenting prematurely before they can be crushed.

A third set of challenges comes with turning the grapes into wine. The winemaker again adopts the precision of a chemist, for the variables in fermenting grapes are legion, and any one of them could make the difference between an award-winning wine and plonk or *vin ordinaire*. Time, temperature, sugar content, the strain of yeast used, the composition of wood barrels—all of these factors are key to the end result, which the winemaker will not know for years to come. Small family wineries hoard their own trade secrets and traditional practices, yet are engines of innovation and paragons of quality.

After the grapes have fermented, the wine has aged and perfected, and finally has been bottled, a wine maker confronts yet another challenge—not animal or vegetable, but legal. Michigan, like other states with similar laws, forbids small wineries from shipping their wines directly to willing Michigan residents unless the winery is located within the state. Wineries on the wrong side of Michigan's borders instead must find a distributor willing and ready to sell their wines in the state—a task so demanding that only a handful of wineries succeed at it.

B. The Number Of Small Wineries In America Has Grown Tremendously In Recent Years, Providing Consumers With A Great And Growing Variety Of Wines.

Despite the hurdles involved in starting a new winery, the wine industry in the United States has changed dramatically in recent years, with explosive growth in the numbers of small wineries across the country. Since 1980, the number of wineries has quadrupled, from 919 to 3,726 in 2004.[2] Most of this growth has been outside Califor-

[2] Except as noted, the figures in this paragraph and the next are derived from data received by WineAmerica from the Treasury Department, which issues permits required to operate wineries.

nia—there are now wineries in all 50 states, and more than half of the nation's wineries are in states other than California. For example, the number of wineries in Texas has jumped from 6 to 91 since 1980.[3] Texas is not alone: in that time, the number of wineries has soared all over the country, from Michigan (21 wineries in 1980 and 90 in 2004) and New York (from 69 to 203) to Washington (from 22 to 323), Oregon (from 36 to 228) and Pennsylvania (from 29 to 99). This new diversity of wineries offers connoisseurs and novices alike unprecedented opportunities to discover and appreciate the artistic skills of vintners from across the country.

The vast majority of wineries are small, farm-based, family-run enterprises. A typical winery occupies 20 acres and produces 4,000 cases of wine annually, either from its own fruit or fruit grown by local farmers. More than 70% of the nation's wineries produce fewer than 10,000 cases yearly, and more than 80% produce fewer than 25,000 cases—a quantity which can be sold entirely through on-site tasting rooms and by direct shipment to consumers via the Internet and other means.[4] Indeed, most wines are "hand sold" through direct contact between a person familiar with the wine (often a winery employee) and the buyer. Except for the largest producers, advertising is too expensive for wine-

[3] In 1981, 6 Texas wineries produced 24,000 gallons of wine. Twenty years later, 46 Texas wineries produced 1,445,000 gallons of wine. *See Texas Wine and Wine Grape Industry Fact Sheet*, Texas Wine Marketing Research Institute, Sept. 2002, *available at* http://www.hs.ttu.edu/texaswine/PT_4071.pdf.

[4] Conversely, the data reflect that most of the wine consumed in this country is made by a relative handful of large producers. According to Treasury Department data, the 50 largest wineries are responsible for 87% of the wine sold, by volume. As discussed below, these wineries have little difficulty obtaining distributors.

makers. Instead, consumers most often find their wines through one-on-one contact—perhaps through the recommendation of a waiter, a wine-store proprietor, or a friend. Or customers may seek a specific wine because they have read about the wine or visited the winery.

Because personal connections are so important in the sale of wine, tourism is essential for smaller wineries, almost all of which have on-site tasting rooms and draw business from visitors. Through tasting rooms, consumers are exposed to the products of "craft" wineries. Guests sign registers and provide their addresses to receive subsequent mailings. Customers who have discovered and developed relationships with particular wineries often want to continue purchasing those wines, even if they live in or later move to another state. This can be difficult: the shelf space available in retail outlets is necessarily limited, and distributors favor those labels they can sell in large volumes. However, the Internet has made it easier for wine drinkers to obtain less common wines.[5]

Small wineries are important to the rural economy. A typical new family winery will provide regular employment for five to ten people, and will have annual sales of $200,000 to $1.5 million. Wineries also attract tourists, with the corresponding benefits to the areas where they are located.[6] In areas where wineries flourish, restaurants, bed-and-breakfasts, inns, retail boutiques and other farm and craft businesses also succeed. Employment associated

[5] *See Possible Anticompetitive Barriers to E-Commerce: Wine*, A Report from the Staff of the Federal Trade Commission, July 2003, at 1 ("FTC Report"), *available at* http://www.ftc.gov/os/2003/07/winereport2.pdf.

[6] For every $3 a winery receives in gross revenue from all sources, tourists will add roughly $1 to the local economy. Bill Nelson & Cary Greene, *Components of a Model Winery Law*, Vineyard and Winery Management (Vol. 29, No. 3, May/June 2003).

with small wineries has transformed economically depressed rural communities, such as the Finger Lakes and Hudson Valley districts in New York, southern Oregon, and eastern Washington. To spur this sort of economic growth, Indiana—like other states—recently launched a "wine trail," a network of wineries within a short drive of each other:

> Organizers hope the trail lures more travelers to their stores, where tasting rooms can turn visitors on to unfamiliar wines.
>
> Jim Butler, owner of Butler Winery in Bloomington, said promoting lesser-known grapes can be a challenge for small wineries, many of which lack the money for extensive advertising. But wine trail organizers think they can pool their resources to promote not only the wine they make, but the industry itself.
>
> "People have an interest in trying new things, in new tastes," Butler said.[7]

As Mr. Butler suggested, the spread of wine trails reflects that American consumers have been discovering new wines. The growth in small wineries reflects the maturation of the wine industry and consumers' increasingly sophisticated tastes. While there are many wines to choose from at any price, the diversity of products is greatest at the high end of the market, in which small wineries are most competitive. Premium wine production is characterized by many boutique wineries crafting small lots of wines. By contrast, "value" market segments are dominat-

[7] Jenny Montgomery, *Move over Napa*, Associated Press, July 17, 2004, *at* http://www.msnbc.msn.com/id/5158783.

ed by the larger producers.[8] As wine drinkers grow more sophisticated, they tend to turn to small labels: American wine drinkers increasingly prefer individualistic, handcrafted wines in lieu of commodity-type wines. One measure of consumers' increasing sophistication is the popularity of wine magazines such as *The Wine Spectator*, which reviews more than 10,000 wines each year. Wine tasting and reviewing involves many factors, objective and subjective, and wine reviews often read like an art critic's review of a symphonic performance or a painter's latest work.

Today there are more than 25,000 domestic wine labels, most of which are produced by small wineries. There is heightened interest in reserve wines (made from particular vineyard blocks where the soil produces better grapes), wines based on variations of winemaking technique (unfiltered, unfined, or carbonic maceration, for example), various blends (such as "Meritage"), and fruit wines. A typical winery may make ten to twenty different offerings from each vintage year. Vintners compete with one another by crafting wines that express the character and nature of the particular wine variety and style, as well as the vintner's own interpretation of the varietal ideal. Many consumers have strong opinions about every step in the production of a wine, from the region and location where the fruit is grown, to the variety of grapes used, to the planting of the vine and the harvest of the fruit, to the means of aging and

[8] "Over two-thirds of the large wineries concentrate their business in the under $8 per bottle wine segment, while the small and mid-sized wineries are focused on the fastest-growing wines, over $8 per bottle." *Small wineries lead state's wine growth*, San Francisco Business Times, July 19, 2004, *available at* http://sanfrancisco.bizjournals.com/sanfrancisco/stories/2004/07/19/daily11.html. "Small and mid-size wineries . . . dominate[ ] high-end sales, selling 66 percent of all wine over $15 with a 71 percent revenue share." *Id.*

bottling of the wine. All of these factors affect the ultimate expression of the vintner's efforts, which is why wines made from the same variety of grape (say, a Cabernet Sauvignon) produced by a winery in one state will differ from a wine made from a similar line of grapes by a different winery in another state.

In the wine world, the word "*terroir*," a French term without an adequate English counterpart, has a special power, referring to the aromas and tastes specific to wines of a particular area. *Terroir* depends on the characteristics of a particular vineyard—the interaction of climate, sun exposure, grape variety, water, soil, and local winemaking techniques. A winery producing 10,000 cases annually usually requires fewer than 50 vineyard acres to grow its grapes. Somewhat larger wineries similarly craft wines from the grapes of a single vineyard. Because they attempt to capture something unique about a place, single-vineyard wines can only be made in limited quantities.

A fine wine is a blend of art and science, and *terroir* is only one aspect of what makes wines unique:

> The winemaker, and that includes the winegrower, can maximize or minimize the fruits of nature by his or her skill .... [N]eighboring winemakers can make totally different quality wine using virtually the same raw product and the same technology. Chemical analysis of the wines in question may be virtually indistinguishable, yet one wine will have all the definition, vitality, and expression of character that the other lacks. Why does this occur? No doubt there are valid reasons that science may one day establish, but in our current state of ignorance I can only say that it is always the winemakers with passion who are able to produce the finer, more characterful

> wines .... Some winemakers have even been known to sleep by their vats during a particularly difficult fermentation, so that they are on hand to make any adjustments immediately if anything goes wrong. From the grower who never hesitates to prune the vine for low yields, yet always agonizes over the optimum time to harvest, to the winemaker who literally nurses the wines through each and every stage of fermentation and maturation, who bottles at precisely the right time and at exactly the correct temperature, the human element is most seriously the joker in the pack when it comes to factors affecting the taste and quality of the wines produced.[9]

Small wineries possess the artistic creativity and the innovative spirit—as well as the economic flexibility—to satisfy this increasing consumer interest in wine variety.

The experience of Oregon reflects these changes in the industry and the tastes of American consumers. Oregon's climate had been seen as poor for grapes, but Oregon's wine industry has blossomed in the last three decades. In 1970, there were fewer than 100 acres of vineyards and only one winery in Oregon; 30 years later, there were 10,500 acres of vinifera vineyards, and now there are 228 wineries.[10] Now, "Oregon has a worldwide reputation for its excellent wines, and its wineries have become a tourist destination, bringing visitors from all over the world to appreciate the beauty and quality of Oregon wine coun-

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[9] Tom Stevenson, *The New Sotheby's Wine Encyclopedia* at 24 (DK Publishing Inc. 1997).

[10] Edward W. Hellman, *Oregon Viticulture* at 1 (Edward W. Hellman ed., Oregon State University Press 2003). Another individual familiar with the Oregon wine industry recalls half a dozen wineries in those days. The current figure is based on Treasury Department data.

try."[11] Paradoxically, Oregon's climate is "marginal" for growing vinifera grape varieties, but this produces grapes with superior flavor. "It is well established that winegrape varieties, when grown with just enough heat to ripen the fruit, retain their best flavors and varietal characteristics."[12]

Among wine connoisseurs, Oregon is particularly known for Pinot noir. "The wine world at large sat up and took notice in 1988, when Robert Drouhin, the prominent Burgundian negociant, started vineyards and a winery in the Red Hills of Dundee, declaring there were only two places in the world he would grow Pinot noir—Burgundy and Oregon."[13] These days, many people visit Oregon wineries and buy locally made wines, like top-quality Pinot noirs. Oregon wineries depend on direct sales of their wines through both their tasting rooms and by direct shipment. But, as we next discuss, these tourists cannot buy many Oregon wines once they return home.

II. MANY STATES, LIKE MICHIGAN, DISCRIMINATE AGAINST OUT-OF-STATE WINERIES BY PROHIBITING DIRECT SHIPMENTS TO THEIR RESIDENTS.

A few wineries are large enough that they have contracts with distributors who sell their wines in other states, and those wines may be found in stores and restaurants across the country. But the typical winery does not offer enough

[11] *Id.* at 1.

[12] *Id.* at 72.

[13] *Id.* at 2. Drouhin's arrival followed on the heels of a 1985 tasting at the International Wine Center in New York City at which an "august group of wine tasters was not able to distinguish Oregon Pinot noir from French Burgundy. And, not only was the number-one ranked wine from Oregon, all five of the top ranked wines were from Oregon." *See id.* at 3.

business to interest distributors and must sell its wines directly to consumers—or not at all. Many states bar out-of-state wineries from shipping directly to their residents, instead requiring them to sell to a distributor. As a practical matter, residents of such states cannot purchase most of the wines made in this country unless they visit the wineries.

A. Many States Discriminate Against Out-Of-State Producers By Requiring Those Producers—But Not In-State Producers—To Sell Through The "Three Tier" System.

About half of the states in the Union ban the direct shipment of wine from out-of-state. Most state bans have their roots in legislation enacted soon after the Twenty-first Amendment ended Prohibition. At that time, state legislatures widely adopted a mandatory "three-tier" system of distribution, requiring producers to sell only through in-state licensed wholesalers. In turn, wholesalers supply retailers. In several states, direct shipment is a felony; in another twenty states, it is a misdemeanor.

Most states, including Michigan, permit their own wineries to ship directly to consumers within the state.[14] While state laws previously constrained the development of small wineries, states increasingly have exempted domestic wineries from the mandatory three-tier system, allowing them to sell wine either at tasting rooms, by telephone and the Internet to retail consumers, at wholesale to retailers and restaurants within their states, or to some combination thereof, and to ship wine directly to their in-state customers.

[14] These include California, Washington, Oregon, New York, Ohio, Pennsylvania, Virginia, Texas, Michigan, Missouri, Illinois, Colorado, North Carolina and New Mexico, which together are home to 85% of the country's wineries.

Given the economic benefits associated with the growth of small wineries, it is easy to understand why state governments would want to promote the development of local rural wineries. Indeed, some of the rural areas which have benefited most from a burgeoning wine industry, like the Finger Lakes region of New York and the Leelanau Peninsula of Northern Michigan, are in states with protectionist regimes. Even in New York and Michigan, though, small wineries would benefit from reciprocal access to consumers in other states.

In states that do not exempt out-of-state direct shipments from the three-tier system, thousands of wineries across the country effectively are shut out of the market. Current circumstances fall far short of the national market envisioned by the framers. Under the influence of powerful wholesalers, many of the states with the greatest consumer demand remain essentially closed to direct shipments from out-of-state, including Florida (the second-largest market), New York (#3), New Jersey (#5), Massachusetts (#6), Michigan (#11) and Ohio (#12).[15] Wholesalers focus their marketing efforts on nationally branded products promising the largest profits and the easiest sales, which usually means representing the 50 or 100 largest wineries. As a result, very few of the 25,000 domestic wine labels are available to consumers in these states.

Exploiting states' authority to regulate alcohol, wholesalers with inordinate political power have used their clout to collect economic rents. Some state laws set excessively high barriers to wholesaler entry or provide franchise protection to distributors. This diminishes competition. In Florida, for example, to obtain and keep a wholesale license, a business must rent or own a warehouse, own outright an

[15] *Adams Wine Handbook 2004.*

inventory with a minimum cost of $100,000, and sell to at least 25% of the licensed vendors in the county.[16] In Georgia, the state requires that wholesalers be given exclusive authority to wholesale a brand, which can only be changed or terminated by a showing of cause, and with the approval of the state liquor commission. In Massachusetts, specific vehicles—instead of businesses—must be licensed to deliver shipments of alcohol, frustrating delivery by large companies such as UPS and FedEx.[17]

In recent years, wholesalers have worked vigorously to block direct shipping. Wholesalers and local producers have political clout with state legislators and regulators; of course, wineries located in other states do not.

B. Without Direct Shipping, Out-Of-State Wineries And Consumers Cannot Do Business With Each Other.

A winery seeking access to consumers in a state barring direct shipment has only one real option—to obtain a wholesaler to distribute its products.[18] Most cannot do so,

[16] In 1997, Florida made it a felony to ship wine directly to Florida consumers and restricted the issuance of wholesaler licenses. In a letter recommending veto of the legislation, Florida Attorney General Robert A. Butterworth characterized the measure as legislation allowing Florida's alcoholic beverage industry "to tighten its vise grip on the distribution of alcoholic beverages. . . . [A bill which] is the perfect tool for the vested interests who seek additional control over the marketplace, at the expense of competition and consumer choice. The legislation is anti-competitive, it is hostile to Florida consumers, and [it is] self-protective." May 19, 1997 letter from A.G. Robert A. Butterworth to Florida Governor Lawton Chiles.

[17] *See* FTC Report at 15.

[18] Ohio suggests that producers also can establish retail outlets, but for most wineries this would be prohibitively expensive. Brief of *amici* Ohio and other States in Support of Petitioners at 20.

and even those that do learn that the three-tier system serves them—and consumers—poorly.

1. Most small wineries cannot get distributors to carry their wines.

Small wineries are unlikely to find wholesalers willing to distribute their wines. Most fundamentally, this is because small wineries cannot offer distributors sales volume comparable to that of the largest winemakers. Even when they are willing to sacrifice a substantial proportion of their profit margin for the sake of getting their wines distributed to consumers, most American wineries rarely succeed in obtaining distributors.[19] By denying shelf space to small products that impose higher handling costs, the wholesaler creates more shelf space or bottle "faces" for products which turn over more quickly.

Given the considerable consolidation which has occurred among wholesalers and distributors in recent years, small wineries also face an increasingly narrow gauntlet of wholesalers. As the number of small wineries has exploded, the number of wholesalers has dwindled. For most other industries, the distribution system can be illustrated by an inverted funnel with a small number of suppliers at the narrow end, a greater number of distributors at the point where the funnel begins to open, and a still larger number of consumers at the base.[20] In contrast, wine's distribution system is shaped like an hour-glass, with many producers,

[19] Wholesalers recognize that this fact is inconvenient as a political matter, and have made gestures at addressing the problem. At the recent convention of the Wines & Spirits Wholesalers of America, a special booth was provided to assist small wineries seeking wholesalers. Though several members of WineAmerica attempted to take advantage of this assistance, not one was successful.

[20] FTC Report at 4.

many consumers, and only a few distributors between them. Wholesalers tend to focus almost exclusively on the well-known, high-volume wines to the exclusion of the smaller, lesser-known brands.[21] Concentration among distributors has not alleviated this problem and may exacerbate it.

And that is only part of the story. Wholesalers rarely generate retail demand for the products of small wineries. That responsibility also falls to the winery and also can be prohibitively expensive.

Having no access to wholesalers, wineries cannot meet the demand for their product from interested consumers who reside in states barring direct shipment. Popular wineries without national distribution are located across the nation in states as diverse as North Carolina, Georgia, Missouri, Texas, Washington, Virginia, Oregon, and New York. These wineries are major tourist attractions that individually welcome from 50,000 to 1,000,000 visitors per year from around the nation. Yet because of laws barring the direct shipment of wine in many states, including Michigan, these popular wineries cannot distribute their products in more than a handful of states.

2. If a small winery does find a wholesaler, its difficulties are not over.

Even for the rare small winery that succeeds in gaining the representation of a wholesaler, the hard fact is that the winery is likely to realize little or no profit from out-of-state sales. Wholesalers ordinarily do little in exchange for the high costs they charge small wineries. The cost of using a wholesaler is overwhelming from a small winery's perspective and saps its entire profit, or more. Yet the small

[21] *Id.* at 45-59.

winery provides negligible income to the wholesaler, which has little incentive to market products which contribute only a small fraction of its total revenue.

Wholesalers are not motivated to aggressively market the products of small wineries, from whom they realize comparatively minimal gross profit. Moreover, because most wine is "hand sold," and because a wholesaler's sales personnel never comes into direct contact with the ultimate customer, the influence of wholesalers on the marketing of the sorts of wines produced by small wineries is dramatically limited. Not surprisingly, wineries that succeed in obtaining wholesalers often complain that the wholesaler fails to maintain contact with restaurants or wine shops after making an initial sales call. Some wineries learn that restaurants have stopped selling their wines because the wholesaler has told the restaurant the wine is unavailable even though the wholesaler actually has the wine in stock. As a result, wineries with wholesalers often find they must incur additional marketing expenses, further draining their narrow margins. For example, wineries must bear the costs of expensive marketing trips to build retailer interest. In *Swedenburg*, the costs to a winery of supporting a wholesaler's operation—exclusive of the wholesaler and retailer's mark-ups—were estimated at approximately $4.00/bottle if only 100 cases are sold, and $8.00/bottle if only 50 cases are sold.[22] Small wineries find that, as a practical matter, they must incur these costs for the wholesalers to sell their wines.

Of course the margins collected by wholesalers and retailers also take money from the wineries, preventing small wineries from recouping their investment. When wine is

[22] Affidavit of Simon Siegl in Support of Swedenburg Plaintiffs' Motion for Summary Judgment at ¶¶ 15-17, A. 3537-3538.

sold through the three-tier system, the winery typically nets less than half of the retail price of a bottle of wine. Almost half of the margin is retained by the retailers and wholesalers. For a bottle of wine selling for $20.00 at retail, the retailer usually will collect about $6.50 and the wholesaler usually will collect about $3.00. After other selling expenses, a small winery will net less than $10.00 per bottle, from which the marketing costs described above must also be deducted. The ultimate net, from $2.00 to $6.00, is almost always less than the winery's cost of production. In contrast, where direct shipment is allowed, a winery selling $20.00 bottles of wine will receive a net of about $19.00 per bottle.[23]

Barred from directly shipping to states governed by the three-tier system, and effectively prevented from selling their wines through wholesalers, most American wineries are excluded from the market in states mandating the three-tier system. At the same time, many such states permit domestic producers to ship wine directly to their residents. While these protectionist regimes undoubtedly serve in-state distributors and producers, they stand in the way of the national market envisioned by the Constitution's drafters.

III. THE DISCRIMINATORY STATE LAWS AT ISSUE HERE VIOLATE THE FUNDAMENTAL PRINCIPLES ANIMATING THE COMMERCE CLAUSE.

For almost two hundred years, this Court has applied the Commerce Clause to promote the development of a national market. As Justice Johnson observed: "If there was any one object riding over every other in the adoption of the constitution, it was to keep the commercial intercourse among the States free from all invidious and partial

[23] *See id.* Typically, wineries sell at the full retail price and collect an additional charge for shipping.

restraints." *Gibbons v. Ogden*, 22 U.S. 1, 290 (1824) (concurring opinion). The founders understood that the grant of power to Congress in the Commerce Clause "grew out of the abuse of the power by the importing States in taxing the non-importing, and was intended as a negative and preventive provision against injustice among the States themselves."[24] As Justice Jackson famously wrote:

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 539 (1949).

To these ends, this Court has applied the dormant Commerce Clause to "prohibit[ ] economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *New Energy Co. v. Limbach*, 486 U.S. 269, 273 (1988). "Thus, where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected. The clearest example of such legislation is a law that overtly blocks the flow of interstate commerce at a State's borders." *Philadelphia v. New Jersey*, 437 U.S.

[24] *See* James Madison, 4 *Letters and Other Writings of James Madison* 14-15 (J.B. Lippincott & Co. 1865) *available at* http://press-pubs.uchicago.edu/founders/documents/a1_8_3_commerces19.html.

617, 624 (1978) (citations omitted). "The Court has consistently found parochial legislation of this kind to be constitutionally invalid . . . ." *Id.* at 627 (describing cases in which "a presumably legitimate goal was sought to be achieved by the illegitimate means of isolating the State from the national economy").

If the founders were concerned about isolation and economic warfare that might take place in a nation without a Commerce Clause, the current patchwork of state wine regulations proves that their fears were prescient. Because the framers' vision of a seamless economic union is not a reality when it comes to interstate shipment of wine, states regularly engage in *de facto* reprisals against other states' protectionist wine laws. Just as Michigan has closed its market to direct shipping from Iowa, so Iowa—through its reciprocity laws—has closed its doors to Michigan wine. But for the Commerce Clause, one might expect all state trade laws to take the form of tit-for-tat reprisals and restrictions.

In applying the dormant Commerce Clause to void protectionist measures, this Court has looked past pretextual defenses. For example, the Court affirmed the entry of a permanent injunction barring the State of Arizona from requiring a cantaloupe grower to build new packing sheds in Arizona instead of shipping the fruit across the California border for packing, concluding that the threat to the reputation of other Arizona cantaloupe growers was incommensurate with the burdens of requiring the grower to go into the packing business. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 145-46 (1970). As *Pike v. Bruce Church* reflects, this "Court has viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere." *Id.* at 145.

There is no real dispute that the discriminatory measures adopted by Michigan and other states cannot survive a traditional Commerce Clause analysis. These measures constitute plain economic protectionism, burdening out-of-state wine producers and benefiting in-state distributors and producers.

IV. THE TWENTY-FIRST AMENDMENT DOES NOT JUSTIFY DISCRIMINATION AGAINST OUT-OF-STATE WINERIES.

A. Under This Court's Decision In *Bacchus*, Discrimination Must Implicate The Principles Underlying The Twenty-first Amendment.

Michigan, like other states that discriminate against out-of-state producers, tacitly acknowledges that its regulatory regime conflicts with two centuries of Commerce Clause jurisprudence, but argues nonetheless that the Twenty-first Amendment frees the states of traditional dormant Commerce Clause restraints.

To the contrary, this Court has rejected Michigan's construction of the Twenty-first Amendment, ruling instead that it must be considered in conjunction with other constitutional provisions. "Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case." *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332 (1964). Thus, in *Bacchus Imports v. Dias*, this Court explained that "one thing is certain: The central purpose of the [Twenty-first Amendment] was not to empower States to favor local liquor industries by erecting barriers to competition." 468 U.S. at 276. Rather, under

Bacchus, the question is "whether the principles underlying the Twenty-first Amendment are sufficiently implicated . . . to outweigh the Commerce Clause principles that would otherwise be offended." *Id.* at 275.

B. The Experience Of States That Permit Interstate Direct Shipping Demonstrates That Restrictive Shipment Laws Are Not Closely Related To The Purposes Of The Twenty-first Amendment.

Michigan and other states argue that the Twenty-first Amendment was intended to ensure that the states could collect tax revenue, and that states have a legitimate interest in preventing underage drinking.[25] But these goals are not furthered by the discrimination at issue here, as demonstrated by the experience of the states that do not impose discriminatory burdens on non-resident winemakers.

1. Many states permit direct shipping from other states.

About half of the states, with 42% of the nation's population, allow some form of interstate direct shipment of wine to their residents.[26] Thirteen states permit the shipment of wine from other states directly to in-state consumers so long as the state of origin also permits direct shipment from the receiving state. In those states,[27] a consumer who is neither a minor nor visibly intoxicated may receive, typically, two cases of wine per month, for person-

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[25] Brief for the Petitioners at 19-20; Brief of *amici* Ohio and other States in Support of Petitioners at 22-24.

[26] Forty states, with 87% of the population, allow consumers to receive wine shipped from within the state.

[27] California, Colorado, Hawaii, Idaho, Illinois, Iowa, Minnesota, Missouri, New Mexico, Oregon, Washington, West Virginia and Wisconsin.

al use and not for resale. Ten other states require that out-of-state shippers obtain permits before shipping directly to consumers.[28] The so-called "shipper permit" legislation in effect in these states requires all shippers to be licensed by the state in which the consumer receives the wine. The state may collect a fee for the permit and may require the shipper to report regularly and pay taxes.

2. States permitting direct shipping do not have problems collecting taxes.

States which permit direct shipping have found means of satisfying other tax and regulatory goals. As the FTC Staff explained: "Several states that allow interstate direct shipping also collect taxes from those shipments. By requiring out-of-state suppliers to obtain permits, states such as New Hampshire have sought to achieve voluntary compliance with their tax laws. Most of these states report few, if any, problems with tax collection."[29] Indeed, WineAmerica supported new direct shipment legislation passed in Virginia, North Carolina and South Carolina requiring out-of-state wineries to obtain a permit and to collect and remit the appropriate sales and use and excise taxes for all wine shipped into those states. Wineries which obtain a permit agree, *inter alia*, to submit to the state's jurisdiction and to collect and remit taxes. Other states with reciprocity agreements forego taxing interstate direct shipments altogether."[30]

[28] Georgia, Louisiana, Nebraska, Nevada, New Hampshire, North Carolina, North Dakota, South Carolina, Texas and Virginia.

[29] FTC Report at 4.

[30] *Id.* at 4.

Winemakers respect state concerns that out-of-state shippers will operate beyond the reach of state laws, and are willing to submit themselves to the regulations of the states to which they ship. Wineries have authored and subscribed to their own code of self-governance, the Wine Industry Code for Direct Shipping (the "Code"). Among other things, the Code (1) allows direct shipping only to locations where such shipping is legal and to persons who may legally consume wine; (2) requires all shipments to be conspicuously labeled so that carriers can deny delivery to unauthorized persons, such as minors; (3) provides that wineries generate reports to the authorities of the receiving state including their total shipping statistics and tax information; (4) mandates that wineries train their employees to appreciate the responsibilities of direct shipping. In addition, the wine industry has collaborated with the National Conference of State Legislators to create a Model Direct Shipping Bill ("MDSB"). The MDSB contains many of the Code's provisions. It also mandates the licensure of out-of-state wineries under the receiving state's laws, thereby establishing a zone of jurisdiction over participating wineries, and sets limitations on the quantity of wine to be sent to any one person. As instruments of self-regulation and cooperation with authorities, the Code and the MDSB demonstrate wineries' willingness to be regulated.

In any event, if a state were to decline to collect excise taxes through a permitting system, the foregone revenues would be minimal. Wine is a bulky, heavy product with high shipping costs. Direct shipment offers a significant price advantage only for fairly expensive wines (i.e., $20 per bottle and up), which constitute a small share of the overall market in table wine.[31] The volume of total wine

[31] FTC Report at 24-25.

sales dwarf direct shipments, given that so many nationally branded wines are readily available at lower cost and with greater convenience from a neighborhood store. In New Hampshire's experience, direct shipment has amounted to about one-third of one percent of the total market for table wine.[32] Even if the volume were half again as large, lost excise taxes in Michigan would be about $37,000 a year, and lost excise taxes in New York would be about $42,000.[33] Likewise, in comparison to the magnitude of other lost sales- and use-tax revenue, the portion attributable to the direct shipment of wine would be miniscule.[34]

In those states which have adopted liberal direct-shipping regimes, the wine industries have prospered, in part

[32] New Hampshire has had a permit direct shipment program for over three years, currently with some 312 permittees. Interstate direct shipments into New Hampshire for the fiscal year ending in June 2004 approximated only 0.32% of table wine sales.

[33] In Michigan, total table wine sales in 2003 were reported to be about 14.5 million gallons. *Adams Wine Handbook 2004*. The Michigan excise tax on wine is $0.51 per gallon (10.2¢ per bottle or $1.21 per case). If 0.5% of total table-wine sales were directly shipped to consumers without the collection of any excise taxes, the lost revenue would approximate $37,050 per year. A similar analysis for New York shows a potential revenue loss from 0.5% of 44 million gallons at $0.19 per gallon approximating $41,800 dollars per year.

[34] Based on conservative assumptions (i.e., an estimate that direct sales would be 0.5% of total table wine sales, an average price of $20/bottle, and no collections through a permit system or use tax payments by state residents), lost sales and use taxes would amount to $581,000 yearly in Michigan and $1.4 million yearly in New York. To lend perspective, revenue losses in New York from all remote sales total about $1.35 billion yearly, and the corresponding figure in Michigan is about $600 million. Donald Bruce & William Fox, *State and Local Sales Tax Revenue Losses from E-Commerce: Updated Estimates*, Center for Business and Economic Research, Sept. 2001, *available at* http://cber.bus.utk.edu/ecomm/ecom0901.pdf.

because of the enhanced access to consumers in states with like regimes. This has been the experience of Oregon, which adopted its new regime in 1989. In turn, these economic benefits return more moneys to the state from other taxes and sources of revenue.

3. Discrimination against direct shipment from out-of-state wineries does not promote moderation or curb underage drinking.

Putative state interests in promoting moderation or curbing underage drinking cannot justify the erection of protectionist barriers against out-of-state producers. Discriminatory provisions like Michigan's have nothing to do with discouraging the consumption of wine by the general public or minors—at best, such provisions merely prompt consumers to purchase wines made in or shipped within Michigan.

Moreover, the contention that permitting direct shipment will encourage underage drinking is baseless. There is no credible evidence that the availability of direct shipment of wine poses a meaningful risk to minors seeking to obtain alcohol. Rather, the significant sources of alcohol to underage drinkers tend to be peers, adults, and commercial outlets. A.C. Wagenaar & T.L. Toomey, et al., *Sources of Alcohol for Underage Drinkers*, Journal of Studies on Alcohol, 57(3) 325-333 (1996). The report by the FTC staff found that "[t]he states that permit interstate direct shipping generally report few or no problems with shipments to minors."[35] Such states have found various ways to avoid such problems. "Some states have applied the same types of safeguards to online sales that already apply to bricks-and-mortar retailers, such as requirements that package delivery

[35] FTC Report at 4.

companies obtain an adult signature at the time of delivery. Some states also have developed penalty and enforcement systems to provide incentives for both out-of-state suppliers and package delivery companies to comply with the law."[36]

C. Consumers Benefit When Direct Shipping Is Permitted.

Wine consumers understand the benefits to them of direct shipping, and are concerned with restrictions on their ordinary rights to engage in interstate commerce. For example, Free the Grapes is a national grassroots coalition composed of wineries and over 300,000 consumer members.[37] This growing army of angry consumers has organized to fight the discrimination that prevents them from benefiting fully from the promises of a national marketplace. These citizens of Michigan, Ohio, Florida—indeed, all fifty states—are ready and willing to engage in otherwise legal and encouraged commercial transactions with the family winemaker.

The FTC staff confirmed what these consumers know, concluding "[a]fter extensive review, . . . that states . . . significantly enhance consumer welfare by allowing the direct shipment of wine to consumers."[38] The benefits to consumers include better selection of wine and cheaper prices. The FTC determined that direct shipment made wines available to consumers who otherwise would have virtually no access to them. "Consumers can purchase many wines online that are not available in nearby bricks-

[36] FTC Report at 4. *See generally id.* at 26-38 & App. B.

[37] *See* Free the Grapes! *at* http://www.freethegrapes.org.

[38] FTC Report at 3.

[39] FTC Report at 3.

and-mortar stores."[39] A survey the FTC conducted in McLean, Virginia, determined that 15% of a sample of "highly popular" wines available online were not available from wine stores within ten miles.[40] For small wineries, whose offerings are not frequently purchased and may not be available at all, that statistic surely understates the problem. The FTC staff acknowledged as much, noting testimony that "unambiguously reveals that, by banning interstate direct shipments, states seriously limit consumers' access to thousands of labels from smaller wineries."[41]

In addition, the availability of direct shipping makes wine less expensive. The FTC staff concluded that "consumers can save money by purchasing online," particularly in the purchase of more expensive wines.[42] According to the McLean study, "if consumers use the least expensive shipping method, they could save an average of 8-13% on wines costing more than $20 per bottle, and an average of 20-21% on wines costing more than $40 per bottle."[43]

CONCLUSION

There is great and growing demand for the products of America's small wineries, which are eager to meet it, but discriminatory laws in many states prevent most wineries from selling to willing consumers. These laws owe to the clout of distributors and the invisibility of non-resident wineries in state legislatures. For the public, these laws

[40] *Id.* at 3.

[41] *Id.* at 3.

[42] *Id.* at 3.

[43] *Id.* at 3.

raise prices and decrease selection. For wineries, these laws Balkanize and erect barriers to the national market. Such laws limit the viability of many wineries across this country. The dormant Commerce Clause does not tolerate discriminatory burdens of this kind, and the Twenty-first Amendment does not excuse them. *Amici* urge this Honorable Court to affirm the decision of the United States Court of Appeals for the Sixth Circuit.

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Nos. 03-1116 & 03-1120 & 03-1274

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IN THE

Supreme Court of the United States

JENNIFER M. GRANHOLM, Governor, *et al.*,
Petitioners,

v.

ELEANOR HEALD, *et al.*,
Respondents.

JUANITA SWEDENBURG, *et al.*,
Petitioners,

v.

EDWARD D. KELLY, *et al.*,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Sixth and Second Circuits

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BRIEF FOR THE WINE AND SPIRITS WHOLESALERS OF AMERICA, NATIONAL ASSOCIATION OF BEVERAGE IMPORTERS, AMERICAN BEVERAGE LICENSEES, THE PRESIDENTS' FORUM OF THE BEVERAGE ALCOHOL INDUSTRY, AND THE ASSOCIATED FOOD DEALERS OF MICHIGAN AS *AMICI CURIAE* SUPPORTING PETITIONERS IN NOS. 03-1116 & 1120 AND RESPONDENTS IN NO. 03-1274

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QUESTION PRESENTED

Does a State's regulatory scheme that permits in-state wineries directly to ship alcohol to consumers but restricts the ability of out-of-state wineries to do so violate the dormant Commerce Clause in light of Sec. 2 of the 21st Amendment?

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INTEREST OF AMICI CURIAE

Wine and Spirits Wholesalers of America, Inc., founded in 1943, is a national trade organization representing more than 370 licensed wine and spirits wholesaler companies in 44 States, the District of Columbia, and Puerto Rico that hold state licenses to act as wine and/or spirits wholesalers. The National Association of Beverage Importers, Inc. is a national trade association that represents the interests of beer, wine, and spirits importers. American Beverage Licensees, Inc. is an association representing the interests of beer, wine, and spirits retailers. The Presidents' Forum of the Beverage Alcohol Industry is a trade association that provides a forum for members' chief executives to respond to issues affecting the beverage alcohol industry. The Associated Food Dealers of Michigan, Inc. provides services to businesses engaged in distribution of food and other products. *Amici* and their members play significant roles in the distribution of alcoholic beverages under state licensing systems. *Amici* thus have a direct interest in the proper resolution of these cases, which involve challenges to those longstanding systems.[1]

STATEMENT

Like all States, Michigan and New York exercise strict control over the sale of alcohol within their borders. As part of their regulatory programs, each State restricts who may make retail sales to its citizens. Under Michigan law, "consumers must purchase alcoholic beverages from licensed retailers." Pet. App. (03-1116) at 5a. Licensed in-state winemakers are likewise permitted to sell at retail, although they may do so only with respect to their own products. *Id.* at 6a. Out-of-state retailers and wineries are not permitted to sell directly to Michigan consumers. *Id.* at 6a.

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[1] The parties have consented to the filing of this brief. No party authored this brief in whole or in part, and no person except *amici* and their members made a monetary contribution to the preparation or submission of this brief. *See* S. Ct. R. 37.6.

The New York retail system is similar in most, though not all, respects. New York law provides that no one may sell alcoholic beverages at retail "without obtaining the appropriate license . . . ." N.Y. Alco. Bev. Cont. Law § 100(1), quoted in Pet. App. (03-1274) at 6a. The law further provides that "[n]o alcoholic beverages shall be shipped into the state unless the same shall be consigned to a person duly licensed hereunder to traffic in alcoholic beverages . . . ," *id.* § 102(1)(c), quoted in Pet. App. (03-1274) at 6a, effectively barring direct sales to consumers by out-of-state vendors. Licensed wineries with an in-state physical presence may sell directly to consumers. *See* Pet. App. (03-1274) at 7a-8a. Wineries that do not meet that condition may not.

Plaintiffs challenged the regulatory systems in both States on the ground that, by prohibiting direct sales from unlicensed out-of-state wineries, the States impermissibly discriminated against interstate commerce. The Sixth Circuit upheld the challenge to Michigan's law, rejecting the idea "that a state's 'virtually complete control' [*see North Dakota v. United States*, 495 U.S. 423, 431 (1990) (plurality opinion) (internal quotation marks omitted)] over liquor regulation enables it to discriminate against out-of-state interests in favor of in-state interests." Pet. App. (03-1116) at 12a. The Second Circuit took a different view with respect to the New York law. After reviewing this Court's decisions addressing the interplay between the Commerce Clause and Section 2 of the Twenty-first Amendment, the court of appeals concluded that "New York's regulatory regime falls squarely within the ambit of Section 2's grant of authority." Pet. App. (03-1274) at 25a. The court found that the provisions limiting the privilege of direct selling to licensed in-state entities "serve[] valid regulatory interests," *id.* at 25a, "allow[ing] the state to monitor the distribution and sale of alcoholic beverages by permitting such distribution and sale only through state-licensed entities supervised by, and accountable to, the [State Liquor Authority]." *Id.* at 25a.

SUMMARY OF ARGUMENT

The short answer to the question posed by this Court is no: the statutory scheme described in the question does not "violate the dormant Commerce Clause, in light of Sec. 2 of the 21st Amendment." Whatever may be the ultimate boundaries of state authority under the Twenty-first Amendment, that authority necessarily includes—as it has for more than seven decades—the power to limit retail sales of alcohol by out-of-state vendors that are not subject to the full extent of state regulatory and taxing powers. That conclusion controls these cases. Plaintiff out-of-state wineries are not subject to the same regulatory oversight as licensed in-state sellers, and, like other out-of-state retail liquor vendors, they have no overriding constitutional right, under the Commerce Clause or any other provision, to disregard state regulatory prohibitions on making direct sales to state citizens.

I. The theory advanced by the plaintiffs—that, if a State permits in-state vendors to sell alcohol directly to consumers, it must allow out-of-state vendors to do so as well—contradicts more than 70 years of regulatory history under the Twenty-first Amendment. During that period virtually every State has required alcohol to be sold pursuant to either a state-monopoly system or a state-licensing system, under which retail sales to consumers (that is, sales for off-premises consumption) are made by in-state vendors. Those systems were implemented after the end of Prohibition precisely to ensure that States would be able to exert the greatest possible control, both as a legal and a practical matter, over those who sold alcohol to their citizens. Given the chaotic conditions that had prevailed prior to ratification of the Twenty-first Amendment, it would be historically anomalous to conclude that States, under compulsion of the dormant Commerce Clause, have been obligated all along to allow vendors across the Nation to sell alcohol directly to consumers within their borders.

Although plaintiffs seek to portray state restrictions on out-of-state consumer sales (of which the laws now at issue are an example) as nothing more than rank favoritism, those restrictions in fact serve important state interests. To begin with, they allow state and local officials to impose necessary limits on the number of vendors licensed to sell alcoholic beverages within the State and to conduct meaningful investigations, with direct community input, regarding who those vendors will be. Furthermore, the licensed vendors' in-state locations, and the importance to them of maintaining their state-granted licenses, give the States much greater power to enforce their laws regarding illegal sales, particularly sales to minors. Finally, the restriction on sales by out-of-state vendors provides concrete assurance that those privileged to sell alcohol actually collect and remit the taxes that the laws impose. That assurance is of critical importance to the States, whose support for the Twenty-first Amendment was prompted in large part by a need for enhanced tax revenues. *See* L.V. Harrison & E. Laine, *After Repeal* 173 (1936).

Plaintiffs attempt to sidestep these state interests, arguing that "temperance" is the only legitimate interest served by the Twenty-first Amendment. Because the laws here *do* serve to inhibit sales of alcohol—especially illegal sales to underage drinkers—the argument is beside the point. But it is also incorrect. As the history of post-Prohibition regulation clearly demonstrates, Section 2 of the Twenty-first Amendment not only allowed States to ban liquor sales entirely, it enabled so-called "wet" States to blunt the harmful influence of unsupervised sellers by establishing strict local control over the sale of alcohol. *See Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 713 (1984) ("core § 2 power" is power "to *regulate* the sale or use of liquor within its borders") (emphasis added). Plaintiffs' alternative vision of a nationwide retail liquor market with thousands of vendors free to

sell directly to consumers—a vision that would sound the death knell of the longstanding liquor distribution system—is flatly inconsistent with that objective.

II. Despite plaintiffs' arguments to the contrary, the dormant Commerce Clause does not prevent States from instituting local control over alcohol sales. First of all, Congress has enacted the Webb-Kenyon Act, 27 U.S.C. §§ 121-22, which (in terms similar to the Twenty-first Amendment) grants broad authority to the States to limit the "shipment or transportation" of alcohol across their borders. That provision gives a federal imprimatur to state laws barring direct out-of-state liquor sales. Furthermore, Congress extended this authority at a time when it was well aware that States were seeking to control alcohol sales by restricting shipments from out-of-state vendors. Thus, even if the dormant Commerce Clause would otherwise cast doubt on the laws at issue here, Congress has effectively overridden its limitations with respect to this kind of state regulation. *See generally Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 429-30 (1946) (Congress may narrow effect of dormant Commerce Clause).

In any event, the Twenty-first Amendment itself limits the effect of the dormant Commerce Clause in these circumstances. Although the Court has rejected the proposition that "the Twenty-first Amendment . . . somehow operated to 'repeal' the Commerce Clause [with respect to regulation of alcohol]," *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 331-32 (1964), it has continued to recognize that, consistent with the original understanding, "[t]he Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980). That principle is sufficient to decide these cases. Here, Michigan and New York have promulgated laws that are directed to the most fundamental

aspect of any "liquor distribution system": who may sell alcohol directly to their citizens. In limiting the right of direct selling to in-state entities over whom the States can exercise the greatest possible oversight, the States are employing just the kind of regulatory authority that the Twenty-first Amendment is meant to protect. *See North Dakota v. United States*, 495 U.S. 423, 432 (1990) (plurality opinion); *see also id.* at 447 (Scalia, J., concurring in the judgment).

The decision in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984)—on which plaintiffs heavily rely—has little bearing on this particular question. That case involved neither importation nor transportation, the subjects to which the Twenty-first Amendment is principally addressed. Moreover, the State in that case defended its discriminatory law solely on the ground that, by providing a competitive advantage, it promoted local industry. While the Court found that particular interest to fall outside the scope of the Twenty-first Amendment, it specifically contrasted the greater deference that is given to "laws enacted to combat the perceived evils of an unrestricted traffic in liquor." *Id.* at 276. Here, the States are seeking to combat those evils, and the Commerce Clause does not bar them from doing so.

ARGUMENT

I. THE TWENTY-FIRST AMENDMENT AUTHORIZES STATES TO RESTRICT RETAIL SALES OF ALCOHOLIC BEVERAGES BY OUT-OF-STATE VENDORS

Section 2 of the Twenty-first Amendment declares that "[t]he transportation or importation into any State . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. Const. Am. XXI, § 2. That language, on its face, indicates that the States' power to control liquor traffic by restricting importation is far-reaching. Furthermore, while this Court has said that the

Twenty-first Amendment does not give States absolute authority over all matters pertaining to alcoholic beverages, *see, e.g., Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 331-32 (1964), it has repeatedly recognized that States may exercise extensive control over the physical distribution of liquor within their borders. *See, e.g., California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984). Thus, in *Midcal*, the Court observed that "[t]he Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." 445 U.S. at 110. Likewise, in *Capital Cities*, the Court noted that "[t]he States enjoy broad power under § 2 of the Twenty-first Amendment to regulate the importation and use of intoxicating liquor within their borders." 467 U.S. at 712.

The cases now before the Court fit squarely within those basic principles. What is at issue is simply the authority of States to control retail sales of alcohol—that is, sales for off-premises consumption—by limiting, or even banning, direct imports to consumers by out-of-state vendors. Numerous States have exercised that authority since the end of Prohibition, and it remains a significant part of most closely-regulated liquor distribution systems today. Although plaintiffs argue that, if a State permits in-state vendors to sell directly to consumers, it must allow the same for out-of-state vendors—a theory that would effectively put an end to the traditional liquor distribution system—the limitation on direct out-of-state sales continues to serve important state interests in controlling the sale of alcohol and in assuring effective tax collection. It thus advances legitimate goals that are consistent with, and protected by, the Twenty-first Amendment.[2]

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[2] In our view, it does not matter whether the Court, in deciding the constitutional question presented here, begins with analysis under the Commerce Clause or analysis under the Twenty-first Amendment. *See*

A. The idea that States may regulate liquor traffic by restricting sales from out-of-state vendors must be understood in historical context. After the tumult of the 1920s, the end of Prohibition brought with it the difficult problem of how to regulate the newly-allowed sale of alcohol. The conditions at the time were not promising: "[W]hat Prohibition did was to transfer the manufacture, sale, and distribution of liquor from legitimate to criminal forces." P. Johnson, *A History of the American People* (1999). Thus, "[i]n the early days after repeal of prohibition the nation was infested with bootleggers and racketeers anxious to continue their trade and willing to thwart the tax and health laws." *National Distributing Co., Inc. v. U.S. Treasury Dept.*, 626 F.2d 997, 1004 (D.C. Cir. 1980). *See Fedway Associates v. U.S. Treasury*, 976 F.2d 1416, 1418 (D.C. Cir. 1992) (noting congressional concern about "corruption of the newly-legal alcohol industry by bootleggers, racketeers, and other criminal types who had flourished during Prohibition.")

It fell primarily to the States, exercising their new constitutionally-recognized powers under the Twenty-first Amendment, to bring order out of this chaos. For the States, a principal goal was to get and maintain control over who could sell alcohol, and thereby to dictate to whom (and under what conditions) they could sell it. After experiencing the lawlessness of the Prohibition era, States wanted to establish laws that were aimed at controlling the excesses of liquor traffic and, perhaps just as important, to enact laws that were

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Pet. App. (03-1274) at 12a-14a. Because we believe that state laws within the scope of the Twenty-first Amendment do not violate the dormant Commerce Clause—either because the Amendment directly limits the dormant Commerce Clause or because, in any event, it "saves" certain alcohol laws from invalidation—the order of analysis seems immaterial. In the end, proper resolution of the issue turns upon whether the state laws in question are within the scope of the Twenty-first Amendment. As we discuss, the state laws here meet that standard.

enforceable. *See* R. B. Fosdick & A. L. Scott, *Toward Liquor Control* 149 (1933) (also known as the Rockefeller Report) ("[r]estrictive laws which cannot be enforced achieve success only on paper.") Furthermore, they sought to levy taxes on the sale of liquor, an ambition that had been one of the moving forces behind the repeal of Prohibition. *See* pages 17-18 *infra*.

In this environment, States saw a particular need for stringent regulation with respect to retail sales of liquor. *See Toward Liquor Control* 65 ("[v]irtually all the individual and social evils of the liquor traffic arise from an inadequately regulated and overstimulated retail sale.") In general, the States approached the problem of regulating sales to consumers in one of two ways. Following the recommendation of the influential Rockefeller Report, approximately 15 States elected to establish state monopolies over the retail sale of alcoholic beverages. In those States, "[t]he primary task of the [State Alcohol] Authority would be the establishment of a chain of its own retail stores for the sale of the heavier alcoholic beverages by package only." *Id.* 64-65. Some States, while generally following the monopoly model, provided for sales of specified products (often wine or beer) by state-licensed entities. *See* L. V. Harrison & E. Laine, *After Repeal* 110-11 (1936). By vesting control in the State itself, the monopoly system of retail distribution naturally tended to preclude direct sales to consumers by out-of-state liquor vendors.

The remaining non-dry States followed a second course—also recommended by the Rockefeller Report (but with misgivings that it would not be rigorous enough), *see Toward Liquor Control* 55-61—that focused, not upon state proprietorship, but upon strict regulation and licensing of private vendors. This system, then known as the licensing system, established a three-tier method of distribution. Under that system, producers were required to sell to licensed whole-

salers, who sold in turn to licensed retailers. *See generally McKesson Corp. v. Division of Alcoholic Beverages*, 496 U.S. 18, 24 n.3 (1990) (describing three-tier system in Florida). Under this type of system, the States closely monitored both wholesalers and retailers, and only licensed retailers were permitted to sell to consumers for off-premises consumption.

The licensing system, again, did not contemplate direct interstate sales to state consumers. To the contrary, it was founded on principles of tight state, and often local, control. In particular, States and local governments sought to exert control with regard to the physical locations at which liquor would be available. Thus, for example, the authors of the Rockefeller Report stated that "[s]uitable restrictions should be established by the license law or by administrative regulation with respect to the number and character of *places* where liquor may be sold." *Toward Liquor Control* 44. The authors further recommended that "[l]icenses issued for the retail sale of liquor should run not only to the person who sells, but to the *premises* where the liquor is sold," *id.* 49, thereby making revocation of the seller's license a more powerful enforcement tool. The licensing States generally followed this regulatory blueprint. *See* B. Bernard, *Liquor Laws* 26 (1949) ("[a] license to sell alcoholic beverages" provides authority to sell alcohol "in the premises set forth by address or other description.")

The importance of local control was reinforced in many licensing States by a further restriction: that retail licenses would be issued only to residents of the State or to corporations with resident officers or shareholders. *See Liquor Laws* 25-26; *see also* Note, *Economic Localism in State Alcoholic Beverage Laws—Experience Under the Twenty-First Amendment*, 72 Harv. L. Rev. 1145, 1148 (1959). Indeed, in some places, state laws required residence in the county or town where the retail business was located. *See*

Liquor Laws 25-26. These laws plainly assisted authorities in evaluating the qualifications of licensees, providing a greater likelihood that applicants would be known to the community in which they sought to operate. *See After Repeal* 74-75 ("[t]wo processes are involved in determining the propriety of issuing licenses, the investigation of applicants and of the premises for which the licenses are requested, and the obtaining of community sentiment toward proposed liquor businesses.") Although it is not clear whether the residence qualification was necessary to other regulatory objectives—given the extensive regulatory control already available over the licensee and the premises themselves—it was accepted as a common feature of post-repeal regulatory schemes. Indeed, in an early case before this Court, its constitutionality was regarded as a given. *See Premier-Pabst Sales Co. v. Grosscup*, 298 U.S. 226 (1936) (discussed at page 22 *infra*).

Finally, the States bolstered local control by imposing direct bans on retail shipments from out-of-state vendors. *See* Shankar, *Alcohol Direct Shipment Laws, The Commerce Clause, and the Twenty-First Amendment*, 85 Va. L. Rev. 353, 356 (1999) ("States . . . passed direct shipment laws to protect the three-tier system, which otherwise could be bypassed by interstate shipment of alcohol from producers directly to consumers.") These laws did not prevent all importation of out-of-state products, but rather required that the products be distributed through the three-tier system. *See id.* at 355. In those States, the three-tier system thus served several related regulatory purposes. Not only did it protect against the notorious "tied house" between producer and retailer—*see Toward Liquor Control* 43 ("[t]he 'tied house' system had all the vices of absentee ownership. The manufacturer knew nothing and cared nothing about the community.")—but it assured that direct sales to consumers would be made by licensed local merchants.

Following the end of Prohibition, therefore, it was widely understood that retail sales of liquor, far from being part of a wide-open national marketplace, instead were subject to strict state and local control. *See generally Carter v. Virginia*, 321 U.S. 131, 138 (1944) (Black, J., concurring) ("local, not national, regulation of the liquor traffic is now the general constitutional policy.") After ratification of the Twenty-first Amendment, the States took steps to assure that, if the State was not itself the direct seller of liquor, it was at least in a position to exercise the greatest possible authority over the direct seller. No one expected that outlets in California or Illinois would be free to sell liquor directly to consumers in Michigan or New York. To the contrary, that kind of unrestrained distribution scheme, with thousands of potential sellers scattered about the Nation, was precisely what the States were seeking to foreclose.

While contemporaneous practice does not conclusively establish constitutionality, the historical evidence at least demonstrates that those enacting alcohol laws after ratification of the Twenty-first Amendment regarded limitations on retail sales by out-of-state vendors as entirely natural and legitimate under its terms. *See Alcohol Direct Shipment Laws*, at 355 (noting that laws against direct shipment have existed "in many states since the repeal of Prohibition.") Indeed, if the Twenty-first Amendment had not countenanced such restrictions, the regulatory systems of most States would have immediately been constitutionally suspect—under plaintiffs' theory of compulsory equal treatment for out-of-state retail sellers—even though they were designed to serve well-recognized, and widely heralded, regulatory goals. That is an implausible conclusion. In their efforts to clean up the liquor traffic, the States were entitled to limit direct sales by out-of-state vendors precisely because their location outside the particular regulating State made them less susceptible to the reach of that State's power.

That principle applies with full force to the laws challenged here. Although plaintiffs try to limit the focus of these cases to sales of wine alone, the distinction that they attack—between direct sales by in-state wine producers (allowed) and direct sales by out-of-state wine producers (prohibited)—is, at bottom, nothing more than an example of the larger distinction made between in-state and out-of-state retail sellers generally. Like other in-state retailers, licensed in-state wine producers are, by virtue of their situs, subject to the complete regulatory and taxing authority of their home States. By contrast, like other out-of-state retailers, out-of-state wine producers tend to operate largely beyond the authority of the individual States in which they now seek to retail their products. That difference, in our view, is decisive. Under the Twenty-first Amendment, a State seeking to control the liquor traffic within its borders need not allow retail sales by out-of-state dealers over whom it has less than full regulatory authority.[3]

B. The Commerce Clause, of course, generally discourages lines drawn between in-state and out-of-state businesses. *See, e.g., C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994). But that rule has a diminished effect where regulation of liquor distribution is in question. *See Craig v. Boren*, 429 U.S. 190, 206 (1976) ("Twenty-first Amendment primarily created an exception to the normal operation of the Commerce Clause."); *see also* pages 21-29 *infra* (discussing effect of Twenty-first Amendment on dormant Commerce Clause). Although the dormant Commerce Clause still prohibits certain forms of pure "economic protectionism," *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276 (1984), it

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[3] We note that any attempt by plaintiffs to fashion a wine-specific constitutional rule would run head-long into the language of the Twenty-first Amendment, which explicitly refers to "intoxicating liquors" without making any distinctions. *See also* 27 U.S.C. § 122 (Webb-Kenyon Act) ("vinous . . . or other intoxicating liquor of any kind.")

necessarily accommodates state regulations that are designed to promote legitimate interests protected by the Twenty-first Amendment. Limitations on out-of-state retail sales directly serve those interests.

1. To begin with, the capacity to limit direct out-of-state sales allows States to exercise the greatest possible influence over the lawful sale of liquor to their citizens. Most immediately, it gives a State the threshold power to determine how many retail liquor sellers there will be. No State allows everyone who wants to sell liquor to do so: rather, in most States, licenses have long been rationed in accordance with population and local preferences. *See After Repeal* 50; *Liquor Laws* 15-17. Although the laws and practices vary among different States, it is common for States to allow local communities to have a say (or even a veto) about the grant or renewal of licenses in their vicinity. As a result, both state and local governments are able to prevent the unrestrained proliferation of retail outlets. By contrast, if States had to allow retail sales by any and all liquor vendors nationwide—as plaintiffs insist—the benefits gained by limiting the number of liquor licenses would necessarily be lost.[4]

The States also have an important interest in knowing as much as possible about who will be selling alcohol to their citizens. A central part of the traditional licensing system has always involved a detailed investigation into the qualifications and character of persons entitled to sell liquor in a

[4] Although States theoretically could impose limits by apportioning licenses between in-state and out-of-state businesses, that solution would only make matters worse. Given the vastly greater number of potential out-of-state sellers, any proportional system (*i.e.*, any system that did not "favor" local applicants) would be severely weighted towards out-of-state sellers, undermining state efforts to impose enforceable restrictions on their licensees. It would also reduce dramatically the incidence of face-to-face transactions between buyers and sellers, thus interfering with enforcement of laws against prohibited sales.

particular community. Indeed, early observers of state regulatory systems remarked that "retail licensing" was "the most important field of licensing activity." *After Repeal* 52. Thus, for example, notices are typically posted *on site* whenever a retail seller seeks to obtain, renew, or transfer a retail liquor license, permitting those in the surrounding community to voice concerns about issuance of the license generally or about the prospective licensee in particular. To compel a State to review and investigate applications from all willing sellers everywhere—or to rely on investigations by other States applying their own criteria—would impose a significant, and undesirable, reworking of the present locally-based system. *See* Pet. App. (03-1274) at 28a.

The local licensing system not only addresses who may sell liquor, it also leads to better control over who may buy it. After Prohibition, experts took the view that "[w]hen liquor licenses are placed in the hands of trustworthy and competent persons the likelihood of subsequent liquor troubles is greatly reduced." *After Repeal* 74. In particular, the selection of licensees is part of the process for seeing that state laws barring sales to minors and the intoxicated are observed. From the ratification of the Twenty-first Amendment to the present day, all States have had laws prohibiting sales to minors. *See U.S. Dept. of Commerce, State Liquor Legislation* 156-63 (1941); *Liquor Laws* 59. Virtually all States have restrictions on sales to intoxicated persons as well. *See State Liquor Legislation* 156-63.

Proper enforcement of these laws, though concededly challenging, remains a state interest of the highest importance. But that enforcement necessarily begins with the expectation that sellers will refuse to sell to those who are not permitted to buy. To back up that expectation, States must wield (and use) the threat that state-issued licenses will be suspended or revoked for noncompliance. *See After Repeal* 215 ("[r]evocation is the only reliable complete remedy for

violations . . . .") Thus, if in-state sellers violate the State's alcohol control laws, they face the loss of their right to sell and, often, of their businesses: for example, in-state wineries would, at a minimum, forfeit their opportunity to sell directly to consumers. The stakes of noncompliance would be very different, however, for national retailers. National retail vendors, doing business across a wide spectrum of States, would have the capacity to spread, and thus minimize, the risk of disregarding state laws. As a result, even if nationwide vendors could be compelled to get licenses for each State in which they sold (a point that is by no means certain), the potential loss of any single state license, and the inability to sell directly in that State alone, would be relatively unimportant.

Finally, as both a practical and legal matter, in-state sellers are subject to far greater ongoing administrative oversight. *See* Pet. App. (03-1274) at 25a ("[p]resence ensures accountability.") By the very fact that licensees are physically located in the regulating State, enforcement officials can more readily investigate, through direct observation, whether they are conforming to the requirements of state law. *See generally Duckworth v. Arkansas*, 314 U.S. 390, 396 (1941) (noting "peculiar difficulties of controlling [intoxicating liquor]").[5] In addition, state laws call for licensed sellers to keep detailed records on site, which are subject to review by state regulatory officials. By contrast, if State enforcement officials were forced to monitor and inspect a myriad of sellers in all other States, that administrative exercise, even if legally permissible, would be both highly impractical and needlessly costly. *See* Pet. App. (03-1274) at 28a.

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[5] Even without nationwide retail sales of alcoholic beverages, Congress has recognized the difficulties that States face in seeking to enforce their liquor laws against out-of-state entities. *See* The Twenty-first Amendment Enforcement Act, 27 U.S.C. § 122a (providing federal jurisdiction for suits by state attorneys general).

2. The limitation of out-of-state retail sales is also important to another critical objective of alcohol control laws: effective tax collection. Indeed, while plaintiff wineries apparently suggest that they would be willing to collect and remit applicable taxes, they can hardly speak for all liquor vendors across the Nation, many of whom would presumably try to gain a competitive advantage by skirting state tax systems. As the Seventh Circuit has observed, "states have insuperable problems collecting their use taxes when people buy from out-of-state vendors that do not collect sales taxes." *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 850 (7th Cir. 2000). Thus, even if the States may constitutionally impose their alcohol taxes on sales by out-of-state retailers, *but see Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), the practical difficulties of enforcement would be enormous.

Advocates of nationwide sales thus choose a different tack, arguing that the problem of tax collection exists with respect to all direct out-of-state sales, not just sales of alcohol. *See, e.g., Alcohol Direct Shipment Laws*, 85 Va. L. Rev. at 358. Their point appears to be that the Court should not give weight to a concern about collection of state alcohol taxes because that concern, taken to its logical conclusion, would allow States to restrict direct out-of-state sales of *any* product. *See id.* But the history of the Twenty-first Amendment is again relevant here. For taxes on alcohol are not just another kind of fungible tax on goods. Rather than being an incidental by-product of the end of Prohibition, alcohol taxes were, in themselves, an important *reason for* the end of Prohibition. Put another way, the imposition of state alcohol taxes was part of the *quid pro quo* that led to enactment and ratification of the Twenty-first Amendment in the first place.

The history itself is well-recognized. As early commentators noted, "[t]he repeal of prohibition was brought about as much by the need for revenue as by the desire to eradicate the evils that grew out of that social experiment." *After Repeal*

173; *see also id.* (advocates of repeal found motivation in a desire to "[t]urn the bootlegger's profits into public revenues"); E. Behr, *Prohibition: Thirteen Years That Changed America* 232-33 (1996). But that goal can only be served, of course, if States are actually able to collect the taxes; to obtain the revenues that they looked for, States must have the right to impose rational conditions to assure proper payment. Thus, once it is recognized that the end of Prohibition was partly set in motion by a need for alcohol taxes, it is plainly counter-historical for liquor sellers to claim that the Constitution denies the States the means of most effectively obtaining them. That theory ultimately devalues one side of the expected bargain, allowing sellers, but not States, the full benefits of repeal. *See* Pet. App. (03-1274) at 28a (noting "burden" of attempting to assure compliance with tax laws).

It is also clear that effective tax collection is important, not just as an end in itself, but as a means of repressing alcohol consumption within the State. While the overall impact is debated, it is clear, at the very least, that States have *intended* alcohol taxes to depress consumption, even as they deal with the concern that excessive taxation would cause consumers to seek out illegal sellers. Reiter, *Citizens or Sinners? The Economic and Political Inequity of 'Sin Taxes' on Tobacco and Alcohol Products*, 29 Colum. J. of Law & Soc. Prob. 443, 449 (1996). Moreover, the revenues from alcohol taxes, taken along with license fees, fund enforcement of the state liquor laws, and support programs that assist state citizens suffering from alcohol-related illnesses. If those revenues are diminished by lack of collection, it follows either that state alcohol programs must be scaled back (at a time when, under plaintiffs' proposed nationwide distribution system, the difficulties of enforcement will be vastly increased), or that funds must be siphoned away from other competing state programs. The restriction of out-of-state retail sales avoids these unpalatable and unnecessary choices, assuring that local

licensees—holding seizable assets within the taxing jurisdiction—are responsible for collecting and remitting the taxes that the laws impose.

3. Largely disregarding these state interests, plaintiffs suggest that the only legitimate goal served by the Twenty-first Amendment is "temperance." But that suggestion, even if correct, would not help them in these cases. Whatever may be said about other kinds of state restrictions, the provisions limiting sales by out-of-state sellers *do* promote temperance. As we have discussed, the traditional licensing scheme necessarily leads to sales made by local retail sellers concerned about the threat of license revocation and other severe sanctions, increasing the likelihood that they will deny sales to those persons—in particular, to minors—for whom liquor is inappropriate. That is an advancement of temperance in a most specific and critical sense. And, insofar as taxes (if collected) reduce consumption, the more general interest in temperance is advanced as well.

In any event, the idea that temperance is the only real goal of the Twenty-first Amendment rests upon a misreading of the historical record. Quite apart from the importance of tax revenues to its ratification, it is plain that the drafters and ratifiers of the Twenty-first Amendment did not envision anything approaching an open market in liquor, limited only by laws specifically intended to shelter "dry" States. Quite the opposite: as we have discussed, the focus of alcohol-related efforts following repeal of Prohibition was upon identifying and implementing effective forms of state *regulation. See Capital Cities Cable*, 467 U.S. at 713 ("core § 2 power" is power "to regulate the sale or use of liquor within its borders.") What the States sought to do—and what the Twenty-first Amendment permitted them to do—was to impose much tighter means of control that would provide for sales of alcohol but avoid the distribution problems of the past. The systems that they chose, including restrictions on direct out-of-state

sales, were designed to meet that goal. While plaintiffs now seek to replace those traditional systems—substituting a broad national marketplace in which out-of-state liquor sellers enjoy full benefits without being subject to full oversight—that view of liquor sales is very different from the one embodied in the Twenty-first Amendment.

II. THE DORMANT COMMERCE CLAUSE DOES NOT BAR STATES FROM RESTRICTING RETAIL SALES BY OUT-OF-STATE VENDORS

A. For several reasons, the dormant Commerce Clause does not prevent States from serving their legitimate interests in controlling alcohol distribution by limiting out-of-state retail sales. First of all, it is well-established that Congress may authorize state actions that the dormant Commerce Clause would foreclose. *See Quill Corp.*, 504 U.S. at 305; *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 429-30 (1946). The Webb-Kenyon Act, by its express terms, does just that. In language similar to that of the Twenty-first Amendment, the Act prohibits "[t]he shipment or transportation . . . of any . . . intoxicating liquor of any kind, from one State . . . into any other State . . . in violation of any law of such State . . . ." 27 U.S.C. § 122. That provision gives state laws restricting "[t]he shipment or transportation" of liquor the weight of explicit federal approval, thus removing whatever check the dormant Commerce Clause might place on laws restricting sales to consumers by out-of-state vendors.

We will not repeat the arguments made on this point by the Michigan petitioners and New York respondents, which demonstrate that the Act does what it purports to do. We note only that Congress chose to reenact the Webb-Kenyon Act at a time—1935—when it was well aware that States, under both the monopoly and three-tier licensing models, would typically be providing for retail sales only by State-controlled entities or by licensed vendors subject to comprehensive state

oversight. (As we have noted, those were the alternative systems proposed by the well-known Rockefeller Report.) It seems highly improbable, therefore, that Congress, in affirmatively prohibiting shipments of alcohol in violation of state law, somehow meant to allow free passage to retail shipments that would have fallen afoul of virtually every state regulatory system at the time. The more sensible reading of the Act is that it intended to permit States to regulate the heretofore untrammeled traffic in liquor by doing precisely what they were doing: restricting the privilege of direct selling to the State itself or to those under its full control.

B. In any event, the Twenty-first Amendment itself authorizes the laws at issue here. By its plain language, the Amendment focuses on two activities—"transportation" and "importation" for delivery or use—declaring either to be prohibited if conducted "in violation of the laws" of any State. Under any normal construction of those words, the Amendment would appear to authorize a law that bars out-of-state sellers from directly importing their alcoholic products for delivery to consumers, and the States plainly thought that it did. *See* pages 9-13 *supra*. Without question, the Amendment has that effect with respect to laws barring *all* sales of liquor. It should have the same effect as applied to regulatory schemes aimed at exercising strict control over the conditions under which alcoholic beverages may be distributed and sold.

The early cases addressing the Twenty-first Amendment certainly saw no grounds for a narrow interpretation. Although the full vitality of those cases is open to question, *see* pages 23-26 *infra*, those cases do, at least, reflect a more or less contemporaneous interpretation of what the Amendment was intended to do. Thus, in *State Board of Equalization v. Young's Market Co.*, 299 U.S. 59 (1936), the Court stated that "[t]he words used [in the Twenty-first Amendment] are apt to confer upon the state the power to forbid all importations which do not comply with the conditions which

it prescribes." *Id.* at 62. Shortly thereafter, the Court stated flatly: "Since the Twenty-first Amendment, . . . the right of a state to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause . . . ." *Indianapolis Brewing Co. v. Liquor Control Comm'n*, 305 U.S. 391, 394 (1939). *See also Mahoney v. Joseph Triner Corp.*, 304 U.S. 401, 403 (1938).

The initial cases from this Court thus were highly respectful of state regulatory authority under the Twenty-first Amendment. In addition, the Court indirectly acknowledged the important regulatory interest in having local control over alcohol distributors. In a case involving a suit brought by an out-of-state corporation, the Court dismissed a challenge to certain Pennsylvania licensing fees—which were substantially higher for distributors that sold imported beer—on the ground that the out-of-state plaintiff lacked standing to bring the suit. *See Premier-Pabst Sales Co. v. Grosscup*, 298 U.S. 226 (1936). Addressing the applicable state law, the Court noted that "no one may sell beer in Pennsylvania unless duly licensed; and no license may issue to a corporation unless all of its officers and directors, and fifty-one per cent of its stockholders, have been residents of the State for the period of at least two years prior to the application for a license." *Id.* at 227-28. The Court then observed that "*[t]he constitutional validity of that provision is conceded . . . .*" *Id.* at 228 (emphasis added). Because the Court accepted that the State could require in-state residence as a valid condition of granting a license, it followed automatically that an ineligible out-of-state business could not complain about how fees for that license were determined.[6]

[6] We note that the constitutionality of "residence" requirements is not before the Court in these cases. Plaintiff wineries were denied the right to sell in Michigan and New York because they are not located in those States. *See* Pet. App. (03-1116) at 6a; Pet. App. (03-1274) at 25a. The cases thus do not involve a situation in which the location requirement is satisfied but a right to sell is nonetheless denied on the ground of lack of citizenship.

Some years later, in *Heublein, Inc. v. South Carolina Tax Comm'n*, 409 U.S. 275 (1972), the Court likewise upheld a state law requiring an out-of-state liquor producer to have a substantial presence within the State. The Court did so even though it expressly recognized that the in-state presence "served none of [the producer's] business interests," *id.* at 277, and that it made the producer subject to a South Carolina tax that it otherwise could have avoided. Despite those adverse effects, the Court found that the requirement of a significant in-state presence was part of "a regulatory scheme that serves legitimate State purposes other than assuring that the State may tax the firm's income . . . ." *Id.* at 282. *See also Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 139 (1939) (approving state policy of "limiting [liquor] traffic in order to minimize well-known evils, and secure payment of revenue.")

It is true, of course, that the Court has since cast doubt on the seemingly absolute language of its early decisions. Thus, it is no longer possible to claim, if it ever was, that "the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause [with respect to regulation of alcohol]." *Hostetter*, 377 U.S. at 331-32 (rejecting that view). But our position here does not depend on that kind of expansive reading of the Twenty-first Amendment. Rather, it rests on the much more basic notion that the Twenty-first Amendment, at its core, permits the States to exercise strict control over how, and where, liquor is distributed to their citizens. That is, under the Amendment, a State may constitutionally impose restrictions on importation that rationally advance its interests in protecting against uncontrolled distribution and in safeguarding its claim to important revenues.

That more limited principle, far from being eroded by decisions of this Court, has received repeated approval. While recent cases have struck down state laws that interfere with congressional power under the Commerce Clause, or that are incompatible with principles of other constitutional amendments, or that violate the dormant Commerce Clause by imposing a discriminatory tax, *see* pages 26-29 *infra*, no case has repudiated, or even cast serious doubt upon, the States' authority to dictate how liquor is sold within their borders. Indeed, in addressing various other questions, the Court has made clear that the power to control distribution of liquor lies at the heart of the authority that the Twenty-first Amendment grants to the States. Thus, in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), the Court recognized that "the Twenty-first Amendment limits the effect of the dormant Commerce Clause on a State's regulatory power over the delivery or use of intoxicating beverages within its borders." *Id.* at 516. And, as we pointed out earlier, *see* page 7 *supra*, the Court in *Midcal* regarded the States as having "virtually complete control" over "how to structure the liquor distribution system." 445 U.S. at 110. *See also Capital Cities Cable*, 467 U.S. at 712.

Plaintiffs thus are only partly correct in asserting that the later cases of this Court have recognized an expanded role for the Commerce Clause and a less extensive role for the Twenty-first Amendment. While it is certainly true that the latter does not displace the former with respect to any and all matters involving treatment of alcohol—as it might have done in the *Young's Market* era—that does not mean that the Twenty-first Amendment takes a back seat with respect to laws within its legitimate scope. To the contrary, where the right to control how liquor is sold is at issue, the Twenty-first Amendment continues to have decisive force.

The decision in *North Dakota v. United States*, 495 U.S. 423 (1990), makes this apparent. There, the Court upheld a North Dakota statute requiring out-of-state shippers to file monthly reports and to affix labels to liquor for sale in federal enclaves within the State. Citing the "virtually complete control" standard set forth in *Midcal*, the plurality found that "[i]n the interest of promoting temperance, ensuring orderly market conditions, and raising revenue, the State has established a comprehensive system for the distribution of liquor within its borders. That system is unquestionably legitimate." *Id.* at 432 (plurality opinion); *see id.* at 438-39 (noting "extensive system of statewide regulation that furthers legitimate interests in promoting temperance and controlling the distribution of liquor, in addition to raising revenue.") Concluding that the North Dakota regulations did not improperly single out the United States for unfavorable treatment, the plurality pointed out that under the State's three-tier system "[a]ll other liquor retailers are required to purchase from state-licensed wholesalers, who are legally bound to comply with the State's liquor distribution system." *Id.* at 439.

In a separate opinion, Justice Scalia, concurring in the judgment, addressed a question close to that presented here: whether North Dakota could require the United States to purchase its liquor from in-state wholesalers rather than from out-of-state suppliers. His conclusion was that it could. Justice Scalia first noted that "[t]he Twenty-first Amendment . . . is binding on the Federal Government like everyone else . . . ." *Id.* at 447. He then stated flatly that the Amendment "empowers North Dakota to require that all liquor sold for use in the State *be purchased from a licensed in-state wholesaler*." *Id.* (emphasis added).

The reasoning of both those opinions is directly relevant here. Like the North Dakota laws, the Michigan and New York restrictions against out-of-state retail sales serve

legitimate state interests in "controlling the distribution of liquor" and "raising revenue." *See* 495 U.S. at 439 (plurality opinion). Furthermore, they stand on the same footing as the North Dakota requirement that all retailers purchase their liquor from "licensed in-state wholesaler[s]." *See id.* at 447 (Scalia, J., concurring in the judgment). If the Twenty-first Amendment empowers a State to require all retailers (including the Federal Government) to purchase liquor only from licensed in-state vendors, it seems evident that it would also empower a State to require that its own citizens purchase liquor only from licensed in-state vendors. Although one requirement applies at the wholesale level, the other at retail, they constitute interrelated parts of a comprehensive regulatory program aimed at exercising vigorous control over the sale of liquor.[7]

C. To counter the decision in *North Dakota*, plaintiffs rely heavily on *Bacchus Imports*, which struck down part of a state tax scheme on dormant Commerce Clause grounds. But, in *Bacchus*, the tax law in question—which exempted certain local alcoholic products from a general state tax—bore, at best, an attenuated connection to the act of importation, and none at all to transportation, the two activities to which the Twenty-first Amendment is primarily addressed. Morever, the State never contended (and, seemingly, could not have contended) that the tax was an integral part of a traditional regulatory system or that it served important state interests in controlling liquor traffic and raising needed revenue. Instead, the State justified the differential treatment

[7] Although Justice Scalia, in his opinion, did not refer to the Commerce Clause, it is fair to assume that his conclusion regarding the in-state sale requirement takes it into account. Even apart from the unqualified nature of the statement that the Twenty-first Amendment "empowers North Dakota to require that all liquor sold for use in the State be purchased from a licensed in-state wholesaler" (495 U.S. at 447), the United States' option of complying with that requirement would be of no significance if it was invalid under the Commerce Clause.

solely on the ground that it promoted local industry. *See* 468 U.S. at 270-71. The Court found that particular explanation to fit poorly with the objectives safeguarded by the Twenty-first Amendment, saying that "[s]tate laws that constitute mere economic protectionism are . . . not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor." *Id.* at 276.

The laws at issue here, however, *are* designed to combat the evils of unrestricted liquor traffic. Like most States—whether they have chosen to implement the monopoly system or the three-tier system—Michigan and New York impose strict regulations limiting who can sell alcohol and under what conditions they can do so. Faced with the prospect of sales by thousands of producers and resellers—most of whom are beyond the full regulatory authority of any given State—the States have elected to bring the sale of liquor as close to home as possible, limiting direct sales by out-of-state dealers. That goal, unlike "mere economic protectionism," is one properly recognized and protected by the Twenty-first Amendment. *See Milton S. Kronheim & Co. v. District of Columbia*, 91 F.3d 193, 203 (D.C. Cir. 1996) (upholding local liquor warehousing requirement on the ground that it served valid enforcement objectives.)

To be sure, a law specifically restricting sales by out-of-state entities will, by its very nature, tend to benefit in-state entities. But, contrary to what plaintiffs appear to believe, that is the beginning, not the end, of the relevant constitutional analysis. The critical question remains whether the law properly serves ends cognizable under the Twenty-first Amendment. If not, as was the case in *Bacchus*, the law cannot be "saved" by that Amendment. But if the law does serve legitimate ends, as it does here, it is not rendered invalid simply because, to serve those ends, its provisions must be directed towards out-of-state businesses. *See*

generally Toomer v. Witsell, 334 U.S. 385, 396 (1948) (under Privileges and Immunities Clause, States may favor their citizens "where there are perfectly valid independent reasons for it."); *Lunding v. New York Tax Appeals Tribunal*, 522 U.S. 287, 298 (1998) (applying *Toomer* standard).

The other cases relied on by plaintiffs deserve only brief mention. For the most part, the cases involve conflicts between state laws regulating some aspect of the liquor trade and constitutional provisions other than the Commerce Clause. *See, e.g., 44 Liquormart, Inc., supra*; *Capital Cities Cable, supra*; *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982); *Craig v. Boren, supra*; *Hostetter, supra*. In resolving those conflicts, this Court has taken the unstartling position that, however broad the authority conferred by the Twenty-first Amendment, it does not permit States to regulate liquor traffic without regard to values embodied in other constitutional provisions like the First Amendment. As the Court observed in *Craig*, "[o]nce passing beyond consideration of the Commerce Clause, the relevance of the Twenty-first Amendment to other constitutional provisions becomes increasingly doubtful." 429 U.S. at 206. The reverse is also true: given that their challenges are specifically grounded in the Commerce Clause, plaintiffs can find little support in decisions with respect to different constitutional provisions.

The remaining few cases, though they do at least involve the Commerce Clause, are scarcely more on point. To the extent that States have argued that the Twenty-first Amendment allows them to take actions affecting liquor pricing in other States, *see Healy v. The Beer Institute*, 491 U.S. 324 (1989); *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573 (1986), the Court has expressed an obvious reluctance to endorse the authority of one State to export its pricing structure to other States (who, of course, have their own regulatory powers under the Twenty-first Amendment). There is no such problem here:

nothing in the Michigan or New York laws "has the undeniable effect of controlling commercial activity occurring wholly outside the boundary of the State." *Healy*, 491 U.S. at 337. To the contrary, each State seeks only to exercise the fullest control over what happens *within* the State itself, protecting its ability to control distribution of alcohol against the prospect of unrestrained direct sales from outside its borders. And nothing in the Michigan or New York laws brings into question the power of the Federal Government to regulate interstate commerce with regard to alcoholic beverages, an issue that necessarily requires definition of the residual Commerce Clause power left to the Federal Government after ratification of the Twenty-first Amendment. *See, e.g., Midcal Aluminum, supra*. Indeed, to the extent that federal power is implicated here, it supports, in the form of the Webb-Kenyon Act, the proposition that in-state sales requirements are constitutionally permissible.

In short, plaintiffs are simply mistaken that, except for laws directly promoting temperance, the Commerce Clause requires an open national marketplace for retail sale of alcohol to consumers. To the contrary: the Twenty-first Amendment authorized the States, not just to prohibit or depress sales of alcohol, but to exercise strict control in order to combat the well-known problems of unregulated sales. Rather than being forced to deal with all potential liquor sellers nationwide, States have the authority to insist that sales to consumers be made only by those within the full reach of their regulatory and taxing powers. The regulations at issue here plainly are a legitimate exercise of that authority, and the Twenty-first Amendment assures their validity.

CONCLUSION

The judgment of the Sixth Circuit in Nos. 03-1116 and 03-1120 should be reversed. The judgment of the Second Circuit in No. 03-1274 should be affirmed.

Respectfully submitted,

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No. 03-1116

IN THE

Supreme Court of the United States

JENNIFER M. GRANHOLM,
Governor of Michigan, *et al.*,

Petitioners,

v.

ELEANOR HEALD, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF AMICUS CURIAE WINE INSTITUTE IN SUPPORT OF RESPONDENTS

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The Wine Institute respectfully submits this brief as amicus curiae in support of respondents. This brief is filed with the written consent of all parties.[1]

INTEREST OF AMICUS CURIAE

Wine Institute is an association of nearly 800 California wineries and affiliated businesses dedicated to advocating public policy to enhance the environment for the responsible consumption and enjoyment of wine. Wine Institute's members are responsible for more than 80 percent of the wine production in the United States.

Wine Institute acts as a voice for the wine industry to educate public policy leaders and to promote fair access to markets for wine. Since its beginning in 1934, Wine Institute has worked to create a climate in which California's wine industry can thrive and prosper. Wine Institute has submitted amicus briefs to this Court in several prior cases defining the boundaries of the 21st Amendment, including *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), and *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996).

To help California wineries expand their national markets, Wine Institute has been a proponent of direct shipping legislation since 1985, when it was the first wine industry organization to successfully urge the passage of such state legislation. Over the past 19 years, Wine Institute has actively sought state legislative solutions allowing direct shipping of wine. Wine Institute's efforts have resulted in the adoption of such laws in a majority of states across the country.

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1. This brief was not authored in whole or in part by the counsel for any party. No person or entity, other than Wine Institute, made a monetary contribution to the preparation or submission of this brief.

Wine Institute's interest in this case is to bring to the Court's attention several of the successful solutions that many states have adopted to allow and regulate direct shipments of wine to consumers. These legislative solutions have fully protected the interests of the states without discriminating against out-of-state wineries.

SUMMARY OF ARGUMENT

Michigan's discriminatory scheme is invalid because the State failed to show that there are no "nondiscriminatory alternatives." Discrimination is "*per se* invalid" unless a State can "demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest." *C & A Carbone, Inc. v. Town of Clarkstown, New York*, 511 U.S. 383, 392 (1994). A state must show that a discriminatory statute "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988). The 21st Amendment does not save Michigan's discriminatory scheme. *See Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984)

In fact, numerous States have adopted reasonable "nondisciminatory alternatives" that allow and regulate direct shipments of wine to consumers, without discriminating against out-of-state wineries. States have adopted statutes that ensure that sales are not made to minors. Statutes also often provide for collection of taxes. The statutes adopted by these States also provide for effective enforcement. The examples herein show that other States have adopted reasonable "nondiscriminatory alternatives" that allow and regulate direct shipments without discriminating against out-of-state wineries. Michigan's discriminatory scheme is invalid.

ARGUMENT

I. Michigan's Discriminatory Scheme Is Invalid Because The State Failed To Show That There Are No "Nondiscriminatory Alternatives."

The Sixth Circuit correctly held that Michigan's discriminatory scheme is invalid because the State failed to show that there are no "nondiscriminatory alternatives": The State had "not shown that the Michigan scheme's discrimination between in-state and out-of-state wineries furthers any" legitimate concerns, "much less that no reasonable non-discriminatory means exist to satisfy these concerns." *Heald v. Engler*, 342 F.3d 517, 526 (6th Cir. 2003). The Sixth Circuit explained:

> The proper inquiry . . . is whether [the regulatory scheme] "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988). . . . We find no evidence on the record that it does.

Heald, 342 F.3d at 527.

This Court has emphasized that discrimination against interstate commerce is "*per se* invalid" unless a State can "demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest." *C & A Carbone, Inc. v. Town of Clarkstown, New York*, 511 U.S. 383, 392 (1994). A state must show that a discriminatory statute "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *New Energy*, 486 U.S. at 278. In determining whether there are non-discriminatory alternatives to a discriminatory statute, the courts

may look to the approach taken by other states to advance similar goals. *See Kraft General Foods, Inc. v. Iowa Dept. of Rev. & Fin.*, 505 U.S. 71, 81 (1992).[2]

The 21st Amendment does not save Michigan's discriminatory scheme. In *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), this Court explained that although the 21st Amendment may give states more authority to legislate "to combat the perceived evils of an unrestricted traffic in liquor" (468 U.S. at 276), "laws that constitute mere economic protectionism are . . . not entitled to the same deference" (*ibid.*). "The central purpose of . . . [Section 2 of the 21st Amendment] was not to empower States to favor local liquor industries by erecting barriers to competition." *Ibid.*; *see Healy v. Beer Institute, Inc.*, 491 U.S. 324, 344 (1989) (Scalia, J., concurring) (the discriminatory character of a law regulating the sale of alcoholic beverages "eliminates the immunity afforded by the Twenty-first Amendment"). *See also Cooper v. McBeath*, 11 F.3d 547, 555 (5th Cir. 1994) (noting that "the core concerns underlying the Twenty-first Amendment are not entitled to greater weight than the principle of nondiscrimination animating the Commerce Clause").

2. In *Kraft*, this Court noted that a "marginal loss in convenience" to a state in an alternative approach would not justify discriminatory state legislation. *Kraft*, 505 U.S. at 81-82.

II. In Fact, Other States Have Adopted Reasonable "Nondiscriminatory Alternatives" That Allow And Regulate Direct Shipments Of Wine To Consumers, Without Discriminating Against Out-Of-State Wineries.

Numerous States have adopted reasonable "nondiscriminatory alternatives" that allow and regulate direct shipments of wine to consumers without discriminating against out-of-state wineries. In fact, 26 States now allow and regulate interstate direct shipments of wine to consumers.[3]

Michigan asserts several purported interests in discriminating against out-of-state wineries — ensuring that sales are not made to minors, ensuring collection of taxes, and providing for effective enforcement. However, there are "nondiscriminatory alternatives"

3. Those states are: Alaska, Arizona, California, Colorado, Georgia, Hawaii, Idaho, Illinois, Iowa, Louisiana, Minnesota, Missouri, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Oregon, Rhode Island, South Carolina, Virginia, Washington, Wisconsin, West Virginia, and Wyoming.

Indeed, direct shipping of wine to consumers is allowed and regulated by many of the States joining in the Brief of Ohio and 32 Other States as *Amici Curiae* supporting Petitioners ("Ohio Amicus Brief"). The Ohio *A*micus Brief recognizes that in those States, "State residents are permitted to have certain amounts of alcohol shipped directly or personally transported to their homes, if State requirements are met." Ohio Amicus Brief, p. 20. The Ohio Amicus Brief then lists various States allowing and regulating direct shipping, including numerous States joining in that brief (Alabama, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Louisiana, Minnesota, Missouri, Nebraska, Nevada, New Jersey, Pennsylvania, Rhode Island, Vermont and Wisconsin). *See* Ohio Amicus Brief, Appendix A. thereto. Yet, the Ohio Amicus Brief erroneously characterizes the issue as whether States must allow "[u]nrestricted direct shipments from out-of-state wineries" (Ohio Amicus Brief, p. 21).

addressing each of these interests. States have adopted "nondiscriminatory alternatives" that address these interests, while allowing and regulating direct shipment.

States have adopted statutes that ensure that sales are not made to minors.[4] For example, North Carolina allows direct shipments only by approved common carriers, who must

> (1) Require the recipient, upon delivery, to demonstrate that the recipient is at least 21 years of age by providing a form of identification specified in G.S. 18B-302(d)(1).
>
> (2) Require the recipient to sign an electronic or paper form or other acknowledgement of receipt as approved by the Commission.
>
> (3) Refuse delivery when the proposed recipient appears to be under 21 years and refuses to present valid identification as required by subdivision (1) of this subsection.
>
> (4) Submit any other information that the Commission shall require.

N.C. Gen. Stat. § 18B-1001.1(c) (2004).

4. *See* Federal Trade Comm'n, *Possible Anticompetitive Barriers to E-Commerce: Wine* at 31 (July 2003) at http://www.ftc.gov/os/2003/07/winereport2.pdf (hereinafter FTC Report) ("state officials report that they have experienced few, if any problems with interstate direct shipment of wine to minors").

North Carolina requires that wine packages be clearly marked and makes both wine shippers and common carriers potentially liable for any deliveries to minors:

> All wine shipper permittees shipping wines pursuant to this section shall affix a notice in 26-point type or larger to the outside of each package of wine shipped within or to the State in a conspicuous location stating: 'CONTAINS ALCOHOLIC BEVERAGES; SIGNATURE OF PERSON AGED 21 YEARS OR OLDER REQUIRED FOR DELIVERY.' Any delivery of wines to a person under 21 years of age by a common carrier shall constitute a violation of G.S. 18B-302(a)(1) by the common carrier. The common carrier and the wine shipper permittee shall be liable only for their independent acts.

N.C. Gen. Stat. § 18B-1001.1(c) (2004).[5]

5. *See, e.g.*, Va. Code Ann. § 4.1-112.1(c) (2004):

> The direct shipment of beer and wine by holders of licenses issued pursuant to this section shall be by approved common carrier only. The Board shall develop regulations pursuant to which common carriers may apply for approval to provide common carriage of wine or beer, or both, shipped by holders of licenses issued pursuant to this section. Such regulations shall include provisions that require (i) the recipient to demonstrate, upon delivery, that he is at least 21 years of age; (ii) the recipient to sign an electronic or paper form or other acknowledgment of receipt as approved by the Board; and (iii) the Board-approved common carrier to submit

(Cont'd)

These statutes can also provide for collection of taxes.[6] New Hampshire's statute provides, for example:

> Direct shippers shall file invoices for each shipment with the liquor commission showing the retail price of the product, and shall pay a fee of 8 percent of the retail price for shipments of liquor, wine, beer, or beverage to the commission. Such filings shall be monthly, and arrive at the commission no later than the tenth of the month following shipment. Direct shippers shall maintain records for at least 3 years which will permit the commission to ascertain the truthfulness of the information filed and permit the commission to perform an audit of the direct shipper's filings upon reasonable request.

N.H. Rev. Stat. Ann. § 178:27(V) (2003).[7]

The statutes adopted by these States also provide for effective enforcement. Statutes can provide that licensed out-of-state shippers are deemed to have consented to the State's jurisdiction. In South Carolina, an out-of-state shipper licensee shall

> be deemed to have consented to the jurisdiction of the department or another state agency and the courts of this State concerning enforcement of this section and any related laws.

S.C. Code Ann. § 61-4-747(C)(6) (2003).[8]

(Cont'd)

> to the Board such information as the Board may prescribe. The Board-approved common carrier shall refuse delivery when the proposed recipient appears to be under the age of 21 years and refuses to present valid identification. All licensees shipping wine or beer pursuant to this section shall affix a conspicuous notice in 16 point type or larger to the outside of each package of wine or beer shipped within or into the Commonwealth, in a conspicuous location stating: 'CONTAINS ALCOHOLIC BEVERAGES; SIGNATURE OF PERSON AGED 21 YEARS OR OLDER REQUIRED FOR DELIVERY." Any delivery of alcoholic beverages to a minor by a common carrier shall constitute a violation by the common carrier. The common carrier and the shipper licensee shall be liable only for their independent acts.

6. *See* FTC Report at 38 ("Many states have adopted less restrictive means of regulating direct shipping, and these states report few or no problems with tax collection").

7. *See, e.g.*, Wyo. Stat. Ann. § 12-2-204(d)(v) (2003):

> [Out-of-state shippers shall]
>
> Remit a tax of twelve percent (12%) of the retail price for each shipment of manufactured wine to the liquor division. Each out-of-state shipper shall file a monthly report with the liquor division and include a copy of the invoice for each shipment of manufactured wine and remit any tax due. The report shall be filed with the liquor division not later than the tenth of the month following the month in which the shipment was made. . . .

8. *See, e.g.*, N.C. Gen. Stat. § 18B-1001.1(d) (2004):

> A wine shipper permittee shall be subject to jurisdiction of the North Carolina courts by virtue of applying for a wine shipper permit and shall comply with any audit or other compliance requirements of the Commission and the Department of Revenue.

Out-of-state shippers who violate State laws regulating direct shipments may be subject to fines, suspension or revocation of their licenses, or criminal prosecution.[9] State statutes can also provide for the filing by the State of an action to enjoin violations of direct shipping statutes, and allow the recovery of costs and attorneys' fees by the State.[10]

Moreover, an out-of-state shipper who violates a State's laws risks sanctions imposed not only by that State, but also by the United States and the shipper's own state. North Dakota has adopted a statutory provision directly addressing that possibility:

> Upon determination by the state treasurer that an illegal sale or shipment of alcoholic beverages has been made to a consumer in this state by either a manufacturer or retailer of alcoholic beverages, the state treasurer may notify both the bureau of alcohol, tobacco, and firearms of the United States department of the treasury and the licensing authority

9. *See, e.g.*, N.H. Rev. Stat. Ann. § 178.27(VII) (2003):

> [A]ny person holding a direct shippers permit under this section who ships liquor, wine or beer to a person under 21 years of age, shall be guilty of a class B felony and shall have such permit permanently revoked.

10. *See* N.D. Cent. Code § 5-01-16(5) (2003):

> The state tax commissioner may initiate and maintain an action in a court of competent jurisdiction to enjoin a violation of this subsection and may request award of all costs and attorneys' fees incurred by the state incidental to that action.

> for the state in which the manufacturer or retailer is domiciled that a state law pertaining to the regulation of alcoholic beverages has been violated and may request those agencies to take appropriate action.

N.D. Cent. Code § 5-01-16(5) (2003).

As indicated above, States can adopt statutes that include reporting requirements to assist enforcement by the State. *See* N.H. Rev. Stat. Ann. § 178:27(V) (2003) & Wyo. Stat. Ann. § 12-2-204(d)(v) (2003). These requirements can be extensive; Wisconsin allows direct shipment only if:

> The winery submits a report to the department by January 31 of each year, on forms furnished by the department, providing the identity, quantity, and price of all products shipped into this state during the previous calendar year, along with the name, address, and birthdate of each person who purchased these products and each person to whom these products were shipped. . . .

Wis. Stat. Ann. § 125.58(4)(a)(4) (2004). These statutes can include provisions requiring out-of-state sellers to retain records and consent to audits by the State.[11]

11. *See, e.g.*, Wyo. Stat. Ann. § 12-2-204(d)(vi) (2003):

> [Out-of-state shippers shall]
>
> (vi) Maintain records for at least three (3) years as will permit the liquor division to ascertain the truthfulness of the information filed and permit the division to perform an audit of the licensee's records upon reasonable request.

The Fifth Circuit in *Cooper v. McBeath*, 11 F.3d 547 (5th Cir. 1994), aptly noted that a State can conduct out-of-state investigations as easily as in-state investigations, In *Cooper*, the Fifth Circuit rejected an argument that Texas' residence requirement for liquor permits was justified by the need to investigate applicants:

> In this age of split-second communications by means of computer networks, fax machines, and other technological marvels, there is no shortage of less burdensome, yet still suitable, options. At first blush, interstate investigations would seem hardly more difficult then intrastate ones. If [a State] desires to scrutinize its applicants thoroughly, as is its right, it can devise non-discriminatory means. . . .

Cooper, 11 F.3d at 554.

In summary, these examples show that other States have adopted reasonable "nondiscriminatory alternatives" that allow and regulate direct shipments without discriminating against out-of-state wineries. Indeed, the fact that Michigan itself allows *intrastate* direct shipment casts serious doubt upon Michigan's purported policy concerns. For example, even if there were isolated problems with direct shipment of wine to minors, any such problems could arise with either interstate or intrastate shipment. Such concerns would not justify statutory schemes discriminating against out-of-state wineries.

Thus, Michigan's discriminatory scheme is invalid.

III. In States Allowing And Regulating Direct Shipments Of Wine To Consumers, Common Carriers Put In Place Policies And Procedures To Ensure Compliance With State Regulations.

Once a State adopts a statute allowing and regulating direct shipments of wine to consumers, common carriers are then in a position to help ensure compliance with State regulations. The Federal Trade Commission has found that both FedEx and UPS, for example, have adopted policies that require their couriers to obtain adult signatures. *See* FTC Report at 36-37.

FedEx's required customer agreement states that "[e]ach recipient must sign for shipments received and be prepared to provide proof of identification and age at the time the package is received." *Id.* at 36. FedEx requires that recipients must be 21 years old and show valid identification; all packages containing wine must have a label prominently warning that an adult signature is required.[12] *Id.* In addition, FedEx verifies the liquor licenses of its wine shippers. *Id.* at 37.[13]

Similarly, UPS requires an adult signature for all wine deliveries. *Id.* For all alcohol shipments, UPS requires that the package's barcode tells the courier that an adult signature is

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12. A sample label is reproduced as an Appendix at the end of this brief.

13. Members of Wine Institute can enroll in FedEx's program for direct shipment of wine to consumers. The wine shipper must furnish FedEx with copies of its liquor licenses/permits; FedEx then determines that the shipper is properly licensed. If the shipper is approved for the program, the shipper must sign an agreement in which the shipper agrees to comply with FedEx's requirements and all applicable laws.

required. *Id.* UPS instructs its drivers to request an identification if the recipient does not appear to be 21 years of age or older. *Id.* If a shipper tries to ship wine without proper labels requiring an adult signature, UPS notifies the shipper that further infractions could result in termination of UPS's services. *Id.*

Thus, where a State allows and regulates direct shipments, FedEx, UPS and other common carriers train their couriers and put in place policies and procedures to further ensure that sales are not made to minors. This again confirms that there are reasonable "nondiscriminatory alternatives" by which States can allow and regulate direct shipments of wine to consumers without discriminating against out-of-state wineries.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

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APPENDIX